



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISC. APPLICATION NO. 83 OF 2014

BENJAMIN A. ONSONGO.....APPLICANT

VERSUS

REPUBLIC.....1ST RESPONDENT

SAMWEL KENANI OMWANDO.....2ND RESPONDENT

RULING

1. By application dated 6th February, 2015, as amended, the complainant, Benjamin Onsongo seeks, inter alia, that the proceedings in Kisii Chief Magistrate's court Criminal Case No. 1056 of 2014 be stayed pending the hearing and determination of this application and that more importantly this court give an **ORDER** that the criminal case No. 1056 of 2014 Republic vs. Samuel Kenani Omwando, be transferred back to Nairobi to Nairobi Chief Magistrate's Court for hearing and disposal.
2. He relies on the following grounds:-
 1. *THAT this honourable court was mis-led when it made an order transferring Nairobi Criminal Case No. 135 of 2014 vide Kisii High Court Miscellaneous Application No. 17 of 2014.*
 2. *THAT the offence herein relate to the forgery of documents purportedly issued by the lands Department, Nairobi in relation to LR KISII/MUNICAPLITY/BLOCK 111/289 and the allotment letter and the entire file is held by the Lands Department, Nairobi.*
 3. *THAT the complainant was lodged in Nairobi and the case was investigated by CID specialized department known as the land Fraud Department at Muthaiga, Nairobi.*
 4. *THAT all the witnesses for the prosecution are resident and working in Nairobi.*
 5. *THAT the offence was committed in Nairobi and the subject property being LR KISII/MUNICIPALITY/BLOCK 111/289 cannot be an exhibit in a case of forgery.*
 6. *THAT both the complainant/Applicant and the investigating officer were not consulted by the 1st respondent counsel on the Application with a view to filing their replying affidavit.*
 7. *THAT it will be costly to transport and accommodate witnesses and the transfer of the suit will occasion delay and inconvenience.*

He further relies on his supporting affidavit, sworn on 5th February, 2015 by the said complainant.

3. **The applicant's submissions.**

The applicant submits that:

- 1. The document in this criminal case are in Nairobi i.e from Nairobi at Ardhi House.*
- 2. The complaint that gave rise to the arrest and subsequent charging of the accused was made in Nairobi.*
- 3. That the application No. 17 of 2014 before Sitati, j, in which to transfer the case to Kisii, was as a result of the court being misled in both facts and law.*
- 4. The court must be guided by the provisions of Section 81 of the Criminal Procedure Act.*
- 5. Which court has jurisdiction to deal with this criminal case- Kisii Court or Nairobi court?*
- 6. This court is invited to read sub-section 69, 71 and 74 of the Criminal Procedure Code, the same be read together.*
- 7. The transfer of this case to Kisii was not made in good faith.*
- 8. The case – the subject matter of this application- is coming before Kisii Chief Magistrate on 12th and 13th February, 2015 be stayed on interim basis until the determination of this application on the core order of the transfer.*

4. The 2nd respondents submissions:

The 2nd respondent relied on his statement of grounds of opposition dated 11th February, 2015 the gist of which was that since this Honourable court having dealt with and/or adjudicated upon an application for the transfer of the original NAIROBI CMCR NO. 135 of 2014 vide KISII HCCR. MISC. CRIMINAL APPLICATION NO. 17 of 2014, this Honourable court is now FUNCTUS OFFICIO, it is over in respect of the subject issue.

Mr. Oguttu amplified his opposition by dealing with six reasons why the 2nd Respondent takes his position:

1. On issue of Locus Standi: the criminal procedure has – always- two sides to its proceedings:

The prosecution- also referred to as the state or the DPP- on one hand and the other- the accused person or persons. The complainant in law is a witness of the prosecution. The complainant can only ventilate his views through the office of the prosecution. Thus, I submit the complainant has no right of audience in a criminal matter such as this. Therefore, I further submit that the complainant has no locus standi. I urge the court to hold the same view.

2. On issue of jurisdiction

The application for transfer of criminal proceedings against the second respondent, vide Kisii High Court Misc. No. 17 of 2014 was made by Sitati,J on 14th February, 2014. I therefore submit that the application is to get this Honorable to overrule justice state. To hold that view would be tantamount to constituting this court as an appellate court over the decision of a court of co-ordinate or concurrent jurisdiction. Thus, I submit this would be tantamount to judicial absurdity. I submit this Honourable to decline this view of the law.

3. On issue of functus officio

It is the 2nd respondent's submission that the issue of transfer of the criminal prosecution of the 2nd respondent by 1st respondent, was adjudicated upon and concluded i.e. judge's Sitati's decision on 2nd April, 2014. I submit that the matter is FUNCTUS OFFICIO. There are no two cases as the applicant would have us believe i.e. Nairobi CMCR. No. 135 of

2014 and KISII CMCR. NO. 1056 of 2014. I submit that this submission by the applicant is misconceived. This court, just as justice state before, are dealing with the same facts, same charges and the same parties. I submit therefore since it's the same facts, same charges and same parties, the issue for determination is *FUNCTUS OFFICIO* and as such it's *FINITO*. I further submit this submission relates equally to the interpretation and application of section 81 of the Criminal Procedure.

4. **On issue of the CONSTITUTIONAL MANDATE of office of the DPP.**

This is a constitutional office. In exercise of it's mandate, some is subject to the direction and control of no power or authority except the jurisdiction of the superior courts to ensure that the decision of the DPP are in accord with the constitution. Unfortunately, the applicant in this application seeks to guide and control the 1st respondent therefore I submit that the order in favour of this application would be unconstitutional in the light of the forth ground.

5. **On issue of veracity and truthfulness.**

Ground (7) of the applicant as spuvious, it is not the complainant who transcripts the witnesses, it is the duty of the 1st respondent. See ground 6, of the applicant where he seeks consultation with the 1st respondent. In light of his constitutional mandate, he does not and cannot seek consultation. I submit that he cannot and ought not to consult. The constitution forbids control and direction.

6. **On issue of abuse of due process of the court.**

By seeking to stay the criminal proceedings due to commence on 12th and 13th is to defeat the taking off of the criminal proceedings. Both Chief-Magistrates in both Nairobi-Kisii are schooled and trained in law. However, the vigour with which the applicant has been prosecuting seems to cause in situations that the competence is only found in Nairobi. Both courts have concurrent jurisdiction in criminal matter what the vigour?

5. It is undoubtedly true that the land documents are in Nairobi Ardhi house:

- a. The letter of allotment.
 - b. The lease instrument.
 - c. The letter forward the lease, all originate from land headquarters in Nairobi, however certain documents also emanate from the local registry: i.e
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- a. The certificate of lease
 - b. The Green card
 - c. The certificate denoting the ownership emote from and are issued at the relevant land registry, in this case, the relevant registry is Kisii land registry.
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6. The other additional reason that makes Kisii, the most appropriate and suitable is that Land is situated within the jurisdiction of the chief magistrate Kisii. The accused is both a Kisii resident and a Kisii by ethnicity.
 7. I submit that the criminal trial ought to be conducted within the reach of the accused to mitigate the expenses of the accused, see 49(2) of the Constitution. It is, therefore, in this regard that in decision of your learned sister, Justice R.N. Sitati, is not assailable.
 8. I submit that this application is calculated to abuse the due process of the court. It is also an

application that is meant to lengthen, delay the period of the trial and defeat the expeditious disposal of the matter. I urge the court to dismiss the application and award costs to the 2nd respondent.

9. The submissions of the 1st respondent

First, everything that I would have said in my submission, were ably covered by counsel for the 2nd respondent. I associate myself fully with his submissions. However, I wish to add a little by pointing out the following: the application to transfer this case No. 1056 of 2014 to Nairobi is an abuse of the court process. This case No. 1056 of 2014 gets its number as a result of the transfer of No. 135 of 2014. The transfer arose from the order made before this court.

This application is an appeal of that order. This court has no jurisdiction to entertain what appears to be an appeal. I submit that this is the position in law. The applicant submitted that the 1st respondent's mandate does not include power of arrest.

The complainant bears no cost of the trial. It is the state to cater for any expenses relating to the trial. So the complainant cannot be heard to say that the expenses are his burden.

It is usual for the complainant to have the trial expeditiously completed yet in this matter, the complainant is engaged in delaying tactics.

It is my submission by virtue of section 71, 72, 74 and 81 of Criminal Procedure Code, the Chief Magistrate in Kisii has jurisdiction to try this case. I ask therefore, that this application be dismissed because it is unmerited.

10. Analysis of the submission and findings

I listened and heard the three submissions by the applicant and the two respondents. It is very clear that when Justice Sitati, ruled in case No. 137 of 2014 on 2nd April, 2014, and subsequently allowed for the transfer of the criminal case to Kisii Chief Magistrate's court, the matter was functus officio.

Therefore any attempt, by the applicant to get the case be transferred to Nairobi yet again in the same way is a misconceived application. This court is not an appellate court in a court of concurrent jurisdiction. This court therefore lacks the jurisdiction to hear the application.

The role of the complainant in any criminal matter is to tender evidence for the prosecution, not to allocate criminal cases to places of their convenience. The vigour with which he pursuing this course is spurious, not bonafide in intention.

11. Accordingly, the court finds this application lacks merit and is hereby dismissed with costs to the 1st and 2nd respondents. Consequently, the interim order of stay of the proceedings in Kisii, Chief Magistrate court case No. 1056 of 2014, Republic vs. Samuel Kenani Omwando, is hereby vacated. The said criminal case to proceed in Kisii in Chief Magistrate's court for hearing and determination by the said court.

Dated, signed and delivered at KISII this 20th day of February, 2015

C.B. NAGILLAH,

JUDGE.

In the presence of:-

Nyachoti (absent) for the applicant

Ochwangi for the respondents

Edwin Mongare Court Clerk.