



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

(Coram: Ojwang, J.)

MISC. CIVIL APPLICATION NO. 40 OF 2009

IN THE MATTER OF: AN APPLICATION BY DANIEL RICCI FOR AN ORDER DIRECTED AT THE DEPUTY REGISTRAR,

HIGH COURT OF KENYA, NAIROBI TO FORWARD TO MALINDI HIGH COURT CIVIL REGISTRY THE ORIGINAL RECORD IN NAIROBI

HCCC NO. 3374 OF 1994 WHEREIN APPLICANT IS 12TH DEFENDANT TOGETHER WITH

ALL OTHER MATTERS THAT RAISE SIMILAR ISSUES FOR FURTHER DIRECTIONS AND/OR ORDERS

-AND-

IN THE MATTER OF: "OBITER" OF 17TH JULY, 2009 IN MALINDI HCCC NO. 98 OF 2009,

ALPHONSE MASIKA NYUKURI AND ANOTHER V. COMMISSIONER OF LANDS & 11 OTHERS

-AND-

IN THE MATTER OF: SELECTION OF A TEST SUIT PURSUANT TO ORDER XXXVII OF THE CIVIL PROCEDURE RULES

-BETWEEN-

DANIEL

RICCI.....APPLICANT

-AND -

**THE DEPUTY REGISTRAR, HIGH COURT OF KENYA,
NAIROBI.....RESPONDENT**

RULING

The application herein does not fall within the general category that comes before the Court, commonly under certificate of urgency; this one comes under certificate of urgency; is dated **29th March, 2011** and filed on **6th April, 2011**; but bears the heading: “*Application (Without Notice) under Section 5 of the Judicature Act (Cap. 8) as Read with the Civil Procedure Rules, 1998 and the Inherent Jurisdiction of the Court*”.

The application carries two main prayers:

- (i) *that, leave be granted to the applicant to commence contempt of Court proceedings for the committal of **the Honourable Lady Justice M. A. Ang’awa** to civil jail for a term not exceeding 6 months for contempt of Court;*
- (ii) *that, upon grant of leave, this Honourable Court be pleased to order **the Honourable Lady Justice M. A. Ang’awa** to appear and show cause why she should not release to the Deputy Registrar, High Court of Kenya, Malindi the original record in Nairobi HCCC No. 3374 of 1994 (**Lali Swaleh & 3 Others v. Stephen Mathenge Wachira & 11 Others**) as more particularized in the Order given on **11th September, 2009** issued on **14th September, 2009** pending the hearing and determination of this application.*

The grounds of the application are set out, in summary, as follows:

- (i) the applicant obtained an order in these proceedings on **11th September, 2009** requiring that the original record in Nairobi HCCC No. 3374 of 1994, together with the original records in respect of 33 other files, be forwarded to the Malindi High Court Registry; and this Order was obeyed as regards 33 files, but disobeyed with regard to the original record in Nairobi HCCC No. 3374 of 1994;
 - (ii) the custodian of all Court files is the Registrar of the High Court;
 - (iii) the Court files ought to be kept or stored in Court Registries, and not in Judges’ Chambers, save for the purpose, and during the period of Judgment-writing by a Judge;
 - (iv) the **Honourable Lady Justice Ang’awa** is keeping the said file and has refused to release the same, to enable it to be forwarded to the High Court at Malindi;
 - (v) though the Order was directed at the Registrar of the High Court, the **Honourable Lady Justice Ang’awa** is aware of the Order but persists in her refusal to release the file;
 - (vi) the **Honourable Lady Justice Ang’awa** has given the explanation that the matter in the file in question was “*finalized by her*”, but this does not justify the refusal to release the file;
 - (vii) the refusal by the learned Judge to release the file has impeded the hearing and finalization of Malindi HCCC No. 98 of 2009 (**Alphonse Masika Nyukuri & Another v. Commissioner of Lands & 11 Others**);
 - (viii) the **Honourable Lady Justice Ang’awa’s** conduct has impeded the administration of justice and has denied the applicant a right to defend himself in relation to the file in question;
 - (ix) the **Honourable Lady justice Ang’awa** has shunned entreaties by the Chief Justice calling for compliance with the Court Order, and has refused to release the file “*insisting that it is only she herself [who] can make any such Order and in that file*”.
- Accompanying the application is a set of facts set out in the pleadings in a Statement, and in the verifying affidavit of the applicant. Annexed to the affidavit is a chain of correspondence relating to the matter in

issue, as well as the Orders of **11th September, 2009** by **Mr. Justice Ibrahim**, which are the basis of the contempt application. In those Orders, the application was certified as urgent and for hearing forthwith. The learned Judge directed the Deputy Registrar at the High Court in Nairobi to forward to the Malindi High Court Civil Registry, for the attention of the Malindi Resident Judge, 34 files including Nairobi HCCC No. 3374 of 1994; learned counsel **Mr. Maranga Maosa** was ordered to do a follow-up on the transfer of the said files from the High Court at Nairobi to the High Court at Malindi; and the matter was to be listed for mention within the ensuing fourteen days.

On **5th October, 2009** the Deputy Registrar at the Malindi High Court forwarded the said Court Order to the Deputy Registrar of the High Court at Nairobi, and asked for due compliance.

The documentation on the file shows that the Deputy Registrar at the High Court in Nairobi was unable to forward file No. 3374 of 1994 to the Malindi High Court as required; for, five months later, on **5th March, 2010** it fell upon the Chief Justice acting through the Principal Judge to write a letter (Ref. No. AMM/PJ/001) to the **Honourable Lady Justice Ang'awa** at Kericho High Court, (partly) as follows:

“An Order of the High Court made by the Hon. Mr. Justice Ibrahim directed that the above file [Nairobi HCCC No. 3374 of 1994] *inter alia*, be forwarded to the High Court, Malindi. It is understood that the said Order was brought to your knowledge but that ... you have continued to hear this matter in Kericho

“You are now directed to comply with the said Court Order and forward the said file to the High Court, Malindi with immediate effect and in any case, not later than *9th March, 2010.*”

It is clear from the record that the **Hon. Lady Justice Ang'awa** was at the time in the process of relocating to the High Court at Eldoret; and on the date mentioned above [**9th March, 2010**] she, through the Deputy Registrar at Kericho High Court, dispatched the file to Eldoret, by cover letter addressed to the Deputy Registrar, High Court of Kenya, Eldoret. The letter (Ref. NRB.HCCC.3374/1994) reads (in part):

“Pursuant to this Court’s order dated *9th March, 2010* the original record of the above-quoted file is forwarded to your Court, to be placed before the Hon. Lady Justice M. A. Ang'awa on *23rd March, 2010* for hearing.”

But on the date the file was forwarded to Eldoret (**9th March, 2010**), the learned Judge wrote to the Principal Judge (Ref. C.J.7/2010 dated **9th March, 2010**) (with copies to the Resident Judge, Malindi; M/s. Maranga Maosa & Associates, Advocates; High Court Registrar; Deputy Registrar, Kericho High Court) (in part) as follows:

“Please be informed that the above case [Nairobi HCCC No. 3374 of 1994] amongst others was *finalized by me* in a test suit in 2009. It is not in order, your Lordship, to move files through correspondence. I would expect parties to appear before me by application or otherwise on the file.”

M/s. Maranga Maosa & Associates, Advocates wrote to the Principal Judge again several times (**22nd March, 2010**) (copied to Lady Justice Ang'awa; to the Resident Judge, Malindi; to the High Court Registrar; and to the Deputy Registrar, Eldoret High Court); and **22nd April, 2010** (similarly copied). To solve the impasse in this matter, the Principal Judge wrote (Ref. NO. AMM/PJ/001 Vol. II) to M/s. Maranga Maosa & Associates, Advocates on **30th April, 2010** (in part) as follows:

“It is suggested that you move the Court appropriately as it would appear, any protracted correspondence may not solve the matter.”

This is the context in which the applicant now comes before this Court, seeking leave to file contempt proceedings, for the committal to jail of **Lady Justice Ang’awa**.

I think this is a case of first impression; I have not heard of any instance in this country, in which a Judge has been accused of contempt of Court. It is not surprising as, in the lay person’s perception, the words “*Court*” and “*Judge*” are, for practical purposes, virtually synonymous; and in deference to that esteem, Judges have been most solicitous of the image of harmony between themselves and the institution they serve. No wonder, no set of rules has been published regarding the role of a Judge in the custodial arrangements for case-files and documents. But, in the light of the incident herein, this Court would suggest that the subject should be accorded attention by the Rules Committee set up under s.81 of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The neighbouring High Court Station at Malindi is run by a single Judge, currently **Lady Justice Omondi**; and when, for cause, she is out of Station, then urgent matters are brought before the High Court at Mombasa. What is now before me is one such matters. There is one case, for hearing and determination at the High Court at Malindi, which touches on tens of related files, with common elements, and a resolution for which ought to be co-ordinated; and this is why **Mr. Justice Ibrahim**, on **11th September, 2009** made orders requiring the Registrar of the High Court, at Nairobi, to have **34 files** forwarded to the High Court at Malindi. This was a normal judicial Order, for expeditious compliance, given the urgency as well as complexity of the matter.

While, however, it is the case that the reason for non-compliance is lodged in the contretemps surrounding Nairobi HCCC No. 3374 of 1994; and while it is for certain, that the **Hon. Lady Justice Ang’awa** has been dealing with that file, and has had charge of it; has she, even on a *prima facie* basis, appeared as a person in contempt of Court and who, therefore, must be summoned before the High Court to show cause why she should not be consigned to jail, for a period of up to six months? The answer to this question will determine the outcome of the application.

There is a valid Court order of **11th September, 2009**. When on **5th March, 2010** the Chief Justice asked that the file be transferred to the Malindi High Court, in compliance with the Court Order, **Lady Justice Ang’awa**, on **9th March, 2010**, while at the Kericho High Court, made a subsequent **Court Order**, moving the file to Eldoret High Court.

Although in her correspondence with the office of the Chief Justice, the learned Judge states that she had “*finalized the matter*” in **2009**, her orders of **9th March, 2010** state that she will be holding a **hearing** on the same file at Eldoret, on **23rd March, 2010**.

The Honourable **Lady Justice Ang’awa** has stated **three reasons** why she is not allowing the original record on Nairobi HCCC No. 3374/1994 to be sent to Malindi High Court, in compliance with the Court Orders of **11th September, 2009**:

- (a) she had “*already finalized the matter*”;
- (b) she **is** the right Judge to make any orders transferring that particular file to any other Court;
- (c) it is irregular to use **correspondence** as the instrument for effecting the transfer of a Court file.

If I were to judge the validity of the three justifications, I would be wrong in **jurisdictional terms**: that is a matter belonging to an appellate Court.

It follows that I must hold, that the learned Judge entertains grounds, in her judicial conscience, which **could** justify her non-release of the file, to be dispatched to the High Court at Malindi.

The complainant's recourse is already identified in the correspondence between the applicant's Advocate and the Principal Judge (**30th April, 2010**): the applicant's counsel should lodge an application, to be listed for hearing before the **Hon. Lady Justice Ang'awa**, under certificate of urgency, for a transfer of the original record for Nairobi HCCC No. 3374, to the High Court at Malindi.

This is an opportunity to consider the question whether the law dictates that a Judge whose conduct, in relation to Court process, Court records or Court premises, is perceived as objectionable, should be made liable on the basis of **contempt of Court**. The applicant herein thinks so; for he thus states:

“The Honourable Lady Justice Ang'awa is not above the law or immune from Court orders and her Ladyship's conduct has impeded the administration of justice and has denied the applicant [the] right to defend himself in that file.”

While recognizing the general validity of such an argument, it is clear to me that the feasibility of fair outcomes from Court process, depends on certain safeguards for the judicial officers as they execute their work; hence they deserve certain immunities; where such immunities are abused, the outcome should be perceived as **misconduct**, to be dealt with as provided under the Constitution. Issues of contempt could fall in that category; as it is inappropriate that a Judge should be charged with contempt of Court before another Judge holding the **same jurisdiction**. Just as with complex issues of interpretation and decision-making, occurring at delicate points in the Constitution's functioning, which have been reserved to the Supreme Court (for instance, under Articles 140, 163 (3), 163 (6)), the question of contempt of Court by a Judge should, by written law, in my opinion, be reserved to the Supreme Court's jurisdiction. Whether a Judge, the prime purveyor of constitutional process, has been in contempt of Court — the core agency of constitutionality — is an inherent and cardinal **constitutional question**, which ought to go to the special jurisdiction of the Supreme Court, in my opinion.

From the facts set out herein, it is clear that there is no *prima facie* evidence of contempt of Court. Consequently, the application is disallowed.

As this Ruling identifies gaps in the statute law and in the relevant rules and regulations, I direct that the Deputy Registrar shall bring it to the attention of the Attorney-General, and the Chairperson of the Rules Committee.

DATED and DELIVERED at MOMBASA this 15th day of April, 2011.

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J. B. OJWANG

JUDGE

Coram: **Ojwang, J.**

Court Clerk: **Ibrahim**

For the Applicant: **Mr. Kinyua Kamundi**