



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KERICHO**

Criminal Misc. App. 10 of 2008

THADDEAUS MARTIN NYAINGIRI O'MOMANYI..... APPELLANT

T/A NYAINGIRI & CO. ADVOCATES

VERSUS

REPUBLICRESPONDENT

RULING

NOTICE OF MOTION DATED 21ST OCTOBER, 2008

I: Application

1. The applicant is an advocate of the High Court of Kenya. He appears in person. He brings this Notice of Motion dated 21st October, 2008 seeking orders

a) That service of this application be dispensed with in the first instance.

b) That the Hon. Court be pleased to put the applicant under arrest

c) That the Hon. Court be pleased to admit the applicant herein to bond on terms it deem fit in the circumstances

d) That the orders of this Hon. Court be served upon the District Criminal Investigation Officer – Kericho and the officer Commanding Kericho Police Station'

2. There being no judge at Kericho the applicant appeared before the High Court of Kenya at Nakuru and was granted bond after the court systematically put him under arrest and thereafter gave him his orders Maranga –J (22nd October, 2008)

3. The Hon. Judge ordered that the application be heard inter-parties at the High Court of Kenya in Kericho.

II: Background of application

4. The applicant has been presenting various litigants in the Subordinate Court at Kericho. The case in

question herein was that of Republic v Antony Kiplangat Korir PM's Criminal Case No. 306/08 in which the said accused person had been charged with breaking into a building and committing a felony contrary to section 306 (a) of the Penal Code. He pleaded not guilty and this trial commenced before Mr. D.O. Rabala, the resident magistrate at Kericho. A total of five witnesses were heard. It was almost 5.00p.m when the advocate for the accused and applicant herein sought the trial magistrate to disqualify himself. The trial magistrate refused to do so stating that it was a delay tactics with two more witnesses left to give evidence. This incident occurred on the 22nd July, 2008. The case was nonetheless adjourned to 16th September, 2008.

5. On 16th September, 2008 in the absence of the accused and his advocate the trial magistrate recorded on the file

"The advocate on record has been appearing in other court at the Kericho Law Courts casting aspersions on the integrity of (my) court 3, which is presided by myself. For that reasons, I am uncomfortable in hearing any suit in which the said advocate Mr. Nyaingiri appears. This matter is referred to Court 2 for further directions"

6. At 3.00p.m of the same day of 16th September, 2008 the trial magistrate issues a warrant of arrest in the absence of the accused, his advocate and the prosecution. Summons was issued for the surety and the matter was ordered to be mention on 22nd August, 2008 in Court No. 1.

7. At 4.20p.m of the same day of the 16th September, 2008 in the absence of the accused his advocate and the prosecution the trial magistrate made note in the file stating

"Court observation/order

at 4.30p.m

SUO MOTO"

"A Letter addressed to the Hon. Chief Justice through the Resident Judge and through the Principal Magistrate, kericho Law Courts written by the accused has just been brought to my attention. The same was delivered by one Thaddeyes Martin Nyaingiri to the office of the Executive Officer. The said letter raises several issues but I have taken upon 3(three) issues which I do order the DCIO, Kericho District to investigate, take relevant statement and charge the accused person and his stated advocate Thaddeyes Martin Nyaingiri with contempt of Court as prescribed for under Section 121(d) and (1) of the Penal code (*Cap 63*) Laws of Kenya as read together with Section 5 of the judicature Act (*Cap 8*) Laws of Kenya. The said issues are as follows:

- a) That the presiding magistrate came to the office drunk at 3.30p.m on 22nd July, 2008.
- b) That the presiding magistrate was drunk
- c) That the presiding magistrate threw the subject criminal case No. 306 of 2008 to counsel for the accused in open court.

The said three (3) issues are contained in the letter dated 16th September, 2008 and I consider them contemptuous of my court, my person and my position in the society.

Under the circumstances, I do make an order that the said two persons be investigated for the above stated offences. I also order that the entire Court file, the said letter and court work register for the day be supplied to the DCIO to assist in the investigation. I further order that this file be kept in the strong room to avoid unnecessary interference by any parties.

Finally, I do disqualify myself from further hearing of this matter for the above reasons. The said letter to

form part of court records as evidence of my reason to disqualify myself.”

“Mention in Court on 22nd September, 2008”

“D.O. RABALA

Resident magistrate 16.9.08”

8. The reasons for this Suo Moto orders laid in a letter addressed to the Hon. The chief Justice on the conduct of the trial magistrate inter alia.

9. The police of course began looking for the advocate who knew nothing of these going on's had summons issued against him on two other files, not related to the criminal case in question.

10. On 17th October, 2008 the advocate learnt through the media that there was indeed a warrant of arrest issued against him. He filed this present application and prayed to court to be admitted to trial pending the hearing of the notice of motion.

11. He asked the orders be set aside.

In reply by the state counsel.

12. The state counsel was of the view that the advocate do submit himself to investigations and did not see anything wrong with the orders that have been given.

13. I believe that the state was actually opposing the application by his reply.

III: Opinion

14. This matter has put the Judiciary on trial. It has indeed brought about the ugly head of the two often poor relationship between the bar and the bench.

15. The two institutions are hand and glove and cannot do without the other.

16. What triggered off this matter was the Hon. Magistrate being asked to disqualify himself. If he refuses as he had done, then the advocate was bound to proceed to the end of the case but on any appeal would bring up the issue herein as part of that appeal.

17. As pointed out the client wrote to the Hon. The Chief Justice complaining of the Hon. Magistrate. This then was the second thing that annoyed the trial magistrate being the letter to the Hon. The Chief Justice. The advocate was not party to this letter.

18. The effect of the letter on him appears to have made the Hon. Magistrate react to such an extent that has disqualified himself but continued to handle the file.

19. A Resident Magistrate is one who has a minimum of two years private practice as an advocate of the High Court of Kenya and two years as a magistrate on the bench. On the 5th year to the 7th year a magistrate should be ready to assume the High Court Bench.

20. The independence of the Judiciary requires that the matter that is before the court should be considered from the evidence placed before that court. No external information should be given to the trial magistrate to effect his or her judgment. The trial magistrate in this mater took matters that was not placed before him as evidence but instead reacted to external factors.

21. Where a letter is written to the Hon. The Chief Justice, it is the said Hon. Chief Justice who would

choose to communicate to the said Resident Magistrate through the Registrar of the High Court of Kenya. The trial magistrate ought to await this communication but did not in this case.

22. Unfortunately his temperament got him so worked up he touched on other cases that concerned the advocate that were completely unrelated and issued summons against the advocate.

23. I must begin to say here, that a judicial officer cannot be sued for actions done on the bench. If an order made is incorrect it still remains an order in force unless otherwise overturned on appeal. That is where the independence of the judiciary is all about. The advocate seeks this Courts assistance to restrain the effecting of the said Court order. He has preferred an appeal which is the correct thing to do (High Court *criminal appeal 29/08*)

24. On the other hand an advocate cannot be victimized for the acts of his client. In this case the advocate was unaware his client wrote a letter to the Hon. Chief Justice. Even if he was aware he cannot stop his client from doing so.

25. The orders made by the trial magistrate are irregular. That the said orders amounts to contempt proceedings, which proceedings for contempt can only be prescribed by the High Court.

26. The investigations of the said advocate and his client cannot be undertaken within an already on going criminal case on offences not committed before the trial magistrate.

27. I hereby allow this application. The said advocate is accordingly admitted to bond. That the said orders of the trial magistrate be set aside.

28. I order that a copy of the Ruling herein be forwarded to the Hon. The Chief Justice through the Registrar High Court of Kenya and to the Attorney General.

DATED this 11th day of November, 2008 at Kericho.

M.A. ANG'AWA

JUDGE

Advocate

T.M.O Nyaingiri in person

R. K. Koech instructed by the Attorney General for the Respondent