



Njagi v Director of Criminal Investigations & another; Law Society of Kenya (Interested Party) (Miscellaneous Criminal Application E468 of 2023) [2024] KEHC 42 (KLR) (Crim) (9 January 2024) (Ruling)

Neutral citation: [2024] KEHC 42 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

MISCELLANEOUS CRIMINAL APPLICATION E468 OF 2023

NW SIFUNA, J

JANUARY 9, 2024

BETWEEN

BRIAN MWENDA NJAGI APPLICANT

AND

DIRECTOR OF CRIMINAL INVESTIGATIONS 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION 2ND RESPONDENT

AND

LAW SOCIETY OF KENYA INTERESTED PARTY

RULING

1. The Applicant herein Brian Mwenda Njagi was arrested and charged at Makadara Magistrate’s Court, with offences relating to masquerading as an Advocate. He was arraigned in the said Court for plea-taking. Before his file was called out, he vanished from the dock in unclear circumstances without him or his Advocate informing the Court Assistant or the Magistrate. When the file was called out, he was absent, having so vanished. That absence prompted the Magistrate to issue a warrant of arrest, for him to be arrested and presented before that Court for plea-taking as earlier scheduled. The warrant was issued on the same day he was to take plea, i.e on 14th December 2023.
2. Four days thereafter, he filed an Application to this Court, for stay or suspension of the said warrant of arrest. To be precise, for the lifting of the said warrant. The Application was filed by way of a Notice of Motion dated 18th December 2023. The same is premised on the grounds stated therein and was supported by a Supporting Affidavit sworn by him on even date. The Application is stated to have been brought under the provisions of Articles 50 and 159 of the Constitution of Kenya 2010.



3. On 8th January 2024 when the Application came up for mention before me as Vacation Duty Judge, the Law Society of Kenya (LSK) through its President Mr Eric Theuri Advocate, made an oral Application for the Society to be joined in this Application, as an Interested Party. Its stake and interest in the matter having been clearly and deservedly demonstrated by the oral representations of its said official, I allowed the LSK into the case as Interested Party with limited participation. Limited only to making oral submissions, and not filing any pleadings; as the being a criminal Application, it is principally between the Applicant and the State's Office of the Director of Public Prosecution and the Directorate of Criminal Investigations (DCI). Thereafter I directed the respondents to file and serve their response(s) before close of business the same day.
4. The principal case was scheduled to be mentioned before the trial Magistrate at Makadara on 10th January 2024. The entire matter being expedient and of a critical nature, I directed that the Application be canvassed by way of oral arguments on 9th January 2024 and determined on the same day. On that day the Law Society failed to appear for the hearing, but since it was merely an interested party and the principal parties were in attendance and ready to proceed, I directed that the hearing proceeds.
5. During the hearing, Mr Kasaya the Applicant's Counsel prosecuted the Application by making very passionate oral submissions and implored this Court to accept the Applicant's prayer and version of the events that led to his sudden and hurried vanishment from the court room on the date of his plea. He explained that just as stated by the Applicant in the Application and in the Supporting Affidavit, while waiting to take plea, and before his file was called, the Applicant suffered a panic attack hence was evacuated and carted away by among others, Mr Kasaya himself.
6. This story was unconvincing and sounded like some court drama and a feigned fainting, calculated to engineer a fake evacuation and thereby facilitate his surreptitious exit and flight from the court room. Noting my skepticism, Mr Kasaya in his address cautioned that with my lack of medical expertise I could not comprehend the seriousness and manner of a panic attack. He then belaboured to explain that a panic attack is neither fright nor paranoia. Very unconvincing indeed! Although the Application had cited only Article 50 and 159 of the Constitution, Mr Kasaya in his passionate submissions introduced and largely clutched of this Court's supervisory jurisdiction over subordinate courts, as encapsulated in Article 165.
7. Those submissions were discounted by the submissions of the respondents' Ms Ntabo a prosecution counsel from the Office of the Director of Public Prosecution. Relying on the Grounds of Opposition she filed, she concluded that the Application did not meet the legal threshold for granting the orders the Applicant was seeking. She submitted that the subject warrant could only be lifted or set aside, if there was an illegality, impropriety, incorrectness or other error, in the manner it was issued. But that there was none of that.

Determination

8. From the pleadings on record as well as the oral submissions by both counsel, the sole issue for determination is whether from the relevant legal provisions and applicable legal principles including the rules of natural justice as well as the material on record, the subject warrant of arrest should be lifted. With tremendous respect to the Applicant, the provisions cited on the face of the Application are irrelevant in the circumstances, and unhelpful to the Applicant's quest. Article 50 (1) is on the general right to a fair hearing before a Court of law or tribunal in whatever proceedings. While Article 50 (2) is a menu of the rights of an accused person in criminal proceedings. Article 159 for its part is on the source and exercise of judicial authority generally.



9. The Supervisory jurisdiction of this Court over the subordinate courts is contained in Article 165(6) and (7) of the Constitution. Which provisions are on most occasions read together with Section 362 and 364 of the *Criminal Procedure Code* (Cap 75 Laws of Kenya). Under this jurisdiction, this Court may call for the record or orders or decision of a subordinate Court and interrogate it for any illegality, incorrectness, impropriety or other error. The Applicant in this Application did not invoke those provisions. Fundamentally, this Court cannot act on mere lamentations without that supervisory jurisdiction having been properly and clearly invoked, and a basis laid for this Court's intervention.
10. The subject warrant of arrest was not issued in the presence of the Applicant who was the accused in that case at the time the file was called for plea. At that moment he had mysteriously vanished or been evacuated from the courtroom by his contacts. Had it been issued while he was in the dock, I would have held it to have been issued improperly and would have set it aside. But in this case, the said warrant of arrest was duly and deservedly issued as the accused had in unclear and dramatic circumstances already vanished from the court room when his file was called for plea-taking.
11. I refuse to buy the theory of him having truly suffered a panic attack or any allied medical condition. In my view not even hysteria. His is a far-fetched story that he must have transplanted from a court drama series such *Vioja Mahakamani* (whose English translation is "Drama in Court"), or fiction series like the *James Hadley Chase* or *John Kirihamiti's* books. It cannot be anything else. Courts should neither embrace nor entertain such drama, as a Court session is supposed to be a formal one and court proceedings a solemn enterprise. Like a temple, the court room should be free of such drama, melodrama, chicanery, and lack of seriousness.
12. Even while virtually attending today's hearing, the Applicant pretended to be lying in a room that he wanted the Court to believe was a hospital ward or medical facility. Yet all this time the Court's eye caught him either winking at, cheekily interacting with, or exchanging glances with some shadowy characters that were hiding therein. With these two episodes, I am convinced beyond peradventure that the Applicant is a master of drama and deceit. I have to politely refuse to be prey to such shameless deceit. This prompted me to ask him for that locality, and he said it was a location near Muthaiga Police Station.
13. By his absence, whether by design or default, the Applicant in concert with others caused himself to conveniently exit or be exited or spirited from the court room without first excusing himself. It is curious why his Advocate in first-aid fashion escorted the Applicant out of the dock, out of the court room and eventually out of the court precincts, into thin air. Without first informing the Magistrate or the Court Assistant, and seeking leave for that medical exit. I find the manner and fashion in which the Applicant hurriedly and dramatically left the court precincts to be suspect and bordering on a pre-meditated scheme that this Court will neither support nor sanitize.
14. For those reasons I am constrained to dismiss this Application, and hereby dismiss it accordingly. I order that the said Warrants of Arrest should be executed as by law contemplated, to ensure that the Applicant is arrested and presented before the trial Court for plea-taking. The taking of Plea is compulsory except in a manner provided by law. For instance under Section 89 of the *Criminal Procedure Code*. I therefore order the Applicant to present himself to the nearest police station for purposes of being arrested and presented before the Makadara Magistrate's Court tomorrow at 9.00 in the forenoon or soon thereafter, for plea-taking.
15. The Applicant being present virtually in this session, and having disclosed that the locality at which he is virtually attending these proceedings from is near Muthaiga Police Station, I hereby direct him to present himself to the OCS of the said Police Station, so that he may be arrested and placed in police custody. His Advocate Mr. Kasaya being an officer of this Court is hereby directed to facilitate the



Applicant's presentment at the said Police Station. This should happen today, not later than by 12.30 PM in any event. Failing which, any police officer and member of the public finding him, shall arrest him and present him to the nearest police station and a report of such arrest shall be made to any court station to facilitate his transit to Makadara Magistrate's Court for plea-taking. It is so ordered.

DATED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF JANUARY, 2024.

PROF (DR) NIXON SIFUNA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Delivered in the Virtual Presence of:

The Applicant - Brian Mwenda Njagi.

Mr Kasaya - the Applicant's Counsel.

Ms Ntabo Prosecution Counsel (ODPP) - for the Respondents.

No Appearance for the Law Society of Kenya (the Interested Party).

