



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 261 OF 2019

IN THE MATTER OF VIOLATION AND INFRINGEMENT OF CONSTITUTIONAL RIGHTS AND FUNDAMENTAL FREEDOM

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA ARTICLES 2(1),10(1)(a)(b) &(c),19(2) &(3)(c),20(1)(a),22(1),23(1) & (3),24(3),25(c),27(1) & (2),48,50(1),159(1) & (2) and (2) (A)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA [PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS AND ENFORCEMENT OF THE CONSTITUTION] PRACTICE AND PROCEDURE RULES 2012

AND

IN THE MATTER OF DENIAL VIOLATION, INFRINGEMENT AND LIMITATION OF THE PETITIONER'S RIGHT TO FAIR HEARING IN CIVIL APPEAL NUMBER 184 OF 2004

AND

IN THE MATTER OF DENIAL VIOLATION AND INFRINGEMENT OF THE PETITIONER'S RIGHT TO ACCESS TO JUSTICE IN CIVIL APPEAL NUMBER 184 OF 2004

AND

IN THE MATTER OF DENIAL VIOLATION AND INFRINGEMENT ON THE PETITIONER'S RIGHT TO EQUALITY AND FREEDOM FROM DISCRIMINATION

AND

IN THE MATTER OF APPLICATION AND INTERPRETATION OF THE CONSTITUTION CONTRARY TO THE NATIONAL VALUES AS ESPOUSED IN ARTICLE 10

AND

IN THE MATTER OF RULES 28,100,101,102,103 & 104 OF THE COURT OF APPEAL RULES 2010, THE APPELLATE JURISDICTION ACT

BETWEEN

HARUN OSORO NYAMBOKI.....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

THE JUDICIAL SERVICE COMMISSION.....2ND RESPONDENT

THE JUDICIARY.....3RD RESPONDENT

PETER MUJUNGA GATHURU.....4TH RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner through a petition dated 3rd July 2019 and filed on the even date seek several reliefs being as follows:-

- a) A declaration be and is hereby issued that the judgment of the Court of Appeal (dated 30th January 2015) in Civil Appeal Number 184 of 2004 is invalid and unconstitutional as the same was a product of the violation of the Petitioner's rights and fundamental freedoms;
- b) A declaration be and is hereby issued that the Petitioner's right to a fair hearing was denied, violated, infringed and limited contrary to Articles 19(3)(c), 25(c) and 50(1) of the Constitution of Kenya when the Court of Appeal determined the Appeal Number 184 of 2004 without according the Petitioner due process, specifically not considering his submissions;
- c) A declaration be and hereby issued that the Petitioner's constitutional right to access to justice was denied, violated and infringed when the court staff decided to return already filed submissions of 22nd January 2015 and subsequently the lack of consideration of those submissions by the court in its judgment;
- d) A declaration be and hereby issued that the petitioner's right to equality and freedom from discrimination as guaranteed under Article 27(1) & (2) of the Constitution of Kenya was fundamentally breached, violated, denied and infringed when the Petitioner's submissions were rejected from the record and even not considered and yet those of the 4th Respondent were considered while they were filed late and never served upon the Petitioner contrary to the Court of Appeal's direction of 30th October 2014;
- e) A declaration be and is hereby issued that the decision of the Court of Appeal Judges to prepare judgment without the submissions of the Petitioner were contrary to the national values as espoused in Article 10 of the Constitution of Kenya;
- f) A declaration be and is hereby issued that the court in Civil Appeal Number 39 of 2015 delivered on 26th July 2016 did not take into account the national values as propounded under Article 10 with respect to equity, social justice, equality, human rights & non-discrimination;
- g) A declaration be and is hereby issued that the finding by the Court of Appeal in Civil Application No. 39 of 2015 that the Petitioner's submissions were to be immaterial were they to be filed is a blatant and patent misapprehension, misapplication and misinterpretation of the Court of Appeal Rules 2010 particularly Rules 28, 100, 101, 102, 103 & 104 that provide for hearing of an Appeal notwithstanding the filing of a Record of Appeal.
- h) A declaration be and is hereby issued that the actions of the Court of Appeal Judges and those of the Court staff in not considering the Petitioner's submissions and returning already filed submission respectively amounted to contravention of the constitution that they swore to uphold and defend contrary to Article 2(4) of the Constitution of Kenya;
- i) A declaration be and is hereby issued that the 4th Respondent's failure to serve submissions as directed on 30th October 2014 amount to an abuse of the due process of the court.
- j) General damages including aggravated and exemplary.

The 1st Respondent's Response

2. The Respondents are opposed to the petition. The 1st Respondent filed grounds of opposition setting out ten (10) grounds being as follows:-

- 1) The petition does not disclose any constitutional violations or breaches against the petitioner.
- 2) Rule 4 of the Court of Appeal Rules, 2010 provides for extension of time: In that 'court has discretion to extend the time limited by the rules or by any decision of the court for doing of any act required by the rules.'
- 3) The petitioner has not demonstrated that he moved the Court of Appeal for extension of time to file his submission in CA No. 184 of 2004 and the same was denied.
- 4) The petitioner has not explained satisfactorily why he failed to file his written submissions in CA No. 184 of 2004 within the stipulated period of time.

5) Judgment in CA No. 184 of 2004 was delivered three months after directions on filing of submissions were issued and as such the petitioner cannot allege breach of the right to fair hearing; the petitioner ought to have filed his submissions within the time directed by court.

6) The petitioner is guilty of material non-disclosure; he has not disclosed that his application seeking to set aside the judgment in CA No. 184 of 2004 was dismissed on merit and that his attempt to file an appeal at the Supreme Court was also denied on merit.

7) The petitioner's continued litigation on the same subject matter amounts to abuse of the process of this Honourable Court.

8) The petitioner has not demonstrated that the Court of Appeal infringed the law or was actuated by malice when dealing with his case.

9) The petitioner has not demonstrated that he was discriminated against; he has not shown that the Court of Appeal Judges failed to consider submissions in CA No.184 of 2004 that were on record.

10) The petition is otherwise incompetent, misconceived, misplaced and in an abuse of the process of this Honourable Court as the Petitioner's rights and fundamental freedoms have not been breached and the same ought to be dismissed with costs.

The 2nd and 3rd Respondent's Response

3. The 2nd and 3rd Respondents filed 5 grounds of opposition being as follows:-

- a) The petition is fatally defective, bad in law and an abuse of the process of this Honourable court;
- b) This Honourable court lacks jurisdiction to grant the reliefs sought herein;
- c) There is no cause of action against the 2nd and 3rd Respondents herein;
- d) The issues raised in the petition are Res Judicata.
- e) The petition lacks merit.

The 4th Respondent's Response

4. The 4th Respondent filed a Replying affidavit by Peter Mujunga Gathuru sworn on 8th October 2019 and a Notice of Preliminary objection dated 19th September 2019 and filed on 20th September 2019 raising three main grounds of objection being as follows:-

- i) That this Honourable Court has no jurisdiction to hear and entertain the petitioner's application and petition as this honourable court has no jurisdiction pursuant to Article 165(6) of the Constitution of Kenya to grant the orders sought therein.
- ii) That this Honourable court lacks jurisdiction to hear and determine the petition herein and the Application of the petitioner in view of the fact that the issues raised by the Petitioner has been conclusively determined by the Court of Appeal in its rulings of 27th May 2016, 17th November 2016, and by the Supreme Court of Kenya by its rulings of 5th October 2018 and 15th May 2019 as such the court lacks jurisdiction to reopen the dispute between the petitioner and the 4th Respondent.
- iii) That the Petitioner's petition and Application is bad in law incompetent, misconceived and an abuse of the process of the court and therefore ought to be dismissed with costs.

5. The 4th Respondent filed submissions dated 8th October 2019 in support of its preliminary objection dated 19th September 2019. The petitioner filed submissions in response dated 22nd October 2019. The counsel for 1st, 2nd and 3rd Respondents did not file any submissions but indicated that they supported the preliminary objection.

Background

6. In the year 1987, the 4th Respondent filed a suit in High Court Civil Suit No. 2874 of 1987 against the Applicant/Petitioner in which the Applicant/Petitioner was the registered proprietor of all that parcel of land known as LR.No.1276/11 situate in the city of Nairobi and comprising of approximately Two decimal five three six (2.536) hectares or thereabout which is equivalent to approximately Six decimal three five (6.35) acres.

7. The 4th Respondent in High Court Civil Suit No. 2874 of 1987 sought against the Applicant/Petitioner for the following orders;

- i) An order for specific performance of the said agreement and an order that the Respondent to execute the transfer in favour of the Respondent as against the Applicant.
- ii) Damages for breach of contract and among other orders.

8. That the suit at the High Court was heard by Justice Kuloba (as he then was) and Judgment delivered on 17th June, 1999 dismissing the 4th Respondent suit.

9. The 4th Respondent aggrieved with the decision/judgment of Justice Kuloba (as he then was) appealed to the Court of Appeal vide Civil Appeal No.184 of 2004. The said appeal was heard and judgment delivered on 30th January, 2015.

10. Immediately, thereafter the applicant filed an application or review and/or setting aside of the court's judgment delivered on 30th January, 2015. The applicant's application dated 13th February, 2015 was heard and dismissed with costs on 27th May, 2016.

11. The Applicant further filed Motion Application dated 10th June, 2016 in the Court of Appeal seeking for orders for;

- a) Leave to appeal to Supreme Court against the ruling and order of the Court of Appeal dated 27th May, 2016.
- b) This honourable court to issue a certificate certifying the decision of the Court of Appeal dated 27th May, 2016 as a matter of general public importance.

12. That again the said applicant's application was dismissed by the Court of Appeal on 17th November, 2017.

13. By Originating Summons dated 29th November, 2017, the applicant filed in the Supreme Court an originating Summons seeking determination of the following questions;

- 1) Whether the Ruling of the Court of Appeal dated 17th November, 2017 should be reviewed, and either affirmed, varied or overturned and that the Applicant be granted a certification that the matter is of great public importance and that there has been a great miscarriage of justice and therefore deserving of an Appeal to this honourable court of the decision of the Court of Appeal in Civil Appeal No.184 of 2004 dated 30th January, 2015 and Civil Application No. 39 of 2015 dated 27th May, 2016.
- 2) Whether the Court of Appeal was right in declining to grant the Applicant leave to appeal to the Supreme Court.
- 3) Whether the Court of Appeal failed, neglected and/or refused to consider the effect of introduction of written submissions as one of the modes of Administration of justice and its introduction is to expedite quick dispensation of justice but not to take away litigant's right to be heard.
- 4) Whether the decision of the Court of Appeal of 27th May, 2016, did not establish a precedent transcending beyond the facts of the Applicant's case in respect to a right to a fair hearing and particularly in reference to filing and serving of the written submissions.
- 5) Whether the decision of the Court of Appeal of 27th May, 2016, did not establish a precedent transcending beyond the facts of the Applicant's case, when it disregarded the right to be heard and instead assumed that failure to be heard does not effect a right to a fair hearing as the appellate court is enjoined with responsibility of examining, analysing, and evaluating evidence before its final verdict.
- 6) Whether the Court of Appeal was right in not considering and making pronouncements of all issues submitted by the applicant in his application for leave to appeal to the Supreme Court.

14. The Applicant's application filed at the Supreme Court in 2017, was heard and dismissed with costs and ruling delivered on 5th October, 2018.

15. The Applicant filed an application dated 20th February, 2019 before the Supreme Court seeking for the following orders;

- i) That the Honourable Court be pleased to extend time limited for filing of a Notice of Appeal against the Ruling and Orders of the Court of Appeal (W.Karanja, M Warsame and F.Azangalala JJA) dated and delivered at Nairobi on the 27th May, 2016.
- ii) That the Honourable Court be pleased to extend time limited for instituting an Appeal against the Ruling and orders of the Court of Appeal (W.Karanja, M. Warsame and F. Azangalala JJA) dated and delivered on 27th May, 2016.

Analysis and Determination

16. I have very carefully considered the petition, the Replying affidavit, the grounds of opposition, the preliminary objection, the counsel rival submissions as well as oral submissions and from the above only one issue arise for determination:-

a) Whether this Honourable court has jurisdiction to hear and determine this matter?

17. The 4th Respondent contention is that this court has no jurisdiction to hear and/or entertain the Petitioner's Application and petition herein, as the court has no jurisdiction pursuant to **Article 165(6) of the constitution** to grant the orders sought herein. It is further urged that in view of the fact that the issues raised by the petitioner has been conclusively determined by the Court of Appeal in its ruling of 27th May

2016, 17th November 2016 and by the Supreme Court of Kenya by its ruling of 5th October 2018 and 15th May 2019, this court therefore lacks jurisdiction to reopen the dispute between the petitioner and the 4th Respondent.

18. The petitioner do not agree that this court lacks jurisdiction and avers that the petitioner has suffered violations of various provisions of the constitution and is seeking remedies provided by the constitution, if at all the petitioner succeeded. It is urged the petitioner like any other Kenyan has a constitutional right to have his dispute determined by the Honourable court by virtue of **Article 22(1) of the constitution**. He is complaining that his unlimited right to fair trial as guaranteed by **Article 25(c) of the constitution** has been violated and he is seeking remedies pursuant of **Article 27(1) of the constitution**. It is further contended the petitioner's alleged violations of his fundamental rights are to be investigated and determined upon full hearing of the petition.

19. The petitioner argue that supremacy of the Constitution of Kenya upon all organs including courts of law is expressly provided for under **Article 2(1) of the constitution**; further the Bill of rights pursuant to **Article 20(1) of the constitution** binds state organs including court of law. It is further argued the state and every state organs have a fundamental duty to respect, protect, promote and fulfil the rights and fundamental freedom in the Bill of Rights pursuant to the provisions of **Article 21(1) of the constitution**.

20. The petitioner avers that the jurisdiction of the High Court is original and appellate. That the High Court has been granted constitutional mandate pursuant to provisions of **Article 23 of the constitution** as read together with **Article 165 of the constitution** to enforce the Bill of rights and the court's mandate in enforcing the Bill of rights is not subject to the limitations whatsoever.

21. The petitioner in support of its proposition referred to the case of **Protus Buliba Shikuku vs Honourable Attorney General reference No.3 of 2011 [2012] eKLR** where the High Court although it was dealing with criminal case whose decision had been handed down by the Court of Appeal and after the Petitioner in a Constitutional Reference had exhausted all avenues of appeal, the Court held at page 15/26 of the Judgment as follows:-

?The mandate of the High Court is spelt out clearly in Article 23(1), this mandate is to be exercised in accordance with Article 165 of the same constitution which entrenches the High Court in the constitution. The mandate donated to the High Court is to hear and determine application for ?redress of denial, violation or infringement or threat to a right or fundamental freedom in the Bill of Rights.?

22. The petitioner contend that in the instant petition he has raised complaints on violation of his fundamental rights enshrined in the Bill of Rights as set out under paragraphs 19,20,21,22,23,24,25,26 and 30 of the petitioner. It is claimed the petitioner is invoking the powers of the High Court pursuant to Articles 23 & 165(1)(3)(a)(b)(d)(i) & (ii) of the constitution.

23. The petitioner further urged that in **Protus Buliba Shikuku** case was cited with approval by the Supreme Court of Kenya in the case of **Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai Estate of & 4 others [2013] eKLR** where the Supreme Court held at paragraph 111 found at page 26 of 38 of the Judgment as follows:-

"Therefore, while accepting senior counsel Nowrojee's contentions that there have been injustices in this case, the choice of forum in question. The Kenya Constitution has given the High Court the exclusive jurisdiction to deal with matters of violations of fundamental rights (Articles 23 as read with Article 165 of the Constitution). The High Court on this point has correctly pronounced itself in a judgment by justices Nambuye and Aroni in Protus Shikuku vs R. Constitutional reference No.3 of 2011, [2012] eKLR.

The Supreme Court further held at paragraph 112 found at page 26 of 38 of the Judgment as follows:-

"The Shikuku case fell within the Criminal justice system; it involved a claim of the Petitioner's fundamental rights by the Court of Appeal, in a final appeal. The trial court failed to impose against the Petitioner the least sentence available in law, at the time of sentencing. On the issue of jurisdiction, the learned Judges, relying on Articles 20, 22, 23 and 165 of the constitution, rightly held that the High Court had jurisdiction to redress a violation that arose from the operation of law through the system of courts, even if the case had gone through the appellate level....."

24. In the instant petition the petitioner seeks to reopen the proceeding before the Court of Appeal and Supreme Court. The petitioner's efforts are to have this court declare a judgment and rulings of the Court of Appeal invalid as well as the judgment of the Supreme Court of Kenya in respect of the dispute which was determined on 30/1/2015 by the Court of Appeal in Civil Appeal No. 184 of 2004. The Court of Appeal and Supreme Court dealt with the issue of fair hearing in their Judgments and Rulings and court found the petitioner's constitutional rights had not been violated.

25. The petitioner arguments are in my view not in line with the constitutional provision under **Article 165(6) of the constitution** which bars High Court from exercising oversight role over superior courts such as Court of Appeal and Supreme Court. **Article 165(6) of the constitution** provides:-

"(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court."

26. Further under **Article 164(3) of the constitution** the constitution gives the Court of Appeal jurisdiction to hear Appeals from the High Court and other tribunals but not otherwise. **Article 164(3) of the constitution** provides:-

"(3) The Court of Appeal has jurisdiction to hear appeals from—

(a) The High Court; and

(b) Any other court or tribunal as prescribed by an Act of Parliament."

27. From the above it clearly follows that the High court cannot exercise supervisory jurisdiction over a superior court nor can it sit on appeal on a decision of a superior court.

28. To buttress the above the 4th respondent referred to decision in the case of **Peter Muiruri vs Credit Bank Limited and others (Civil Appeal No. 23 of 2003)**, where the Court of Appeal rejected this notion stating:-

"There is no provision in the constitution which establishes what Nyamu J. referred to as the Constitutional Court. In Kenya we have a Division of the High Court at Nairobi referred to as ?Constitutional and Judicial Review? Division. It is not an independent Court but merely a Division of the High Court. The wording of Section 67 of the constitution which donates the power to the High Court to deal with questions of interpretation of Sections of the Constitution or acts thereof does not talk about a Constitutional Court. Instead it talks about the High CourtThe Hon, the Chief Justice must have been aware that no such Court is established under the Constitution and that, we think, would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a Constitutional Court as opposed to creating a Division of the High Court...The fact that a Constitutional Division was established did not by such establishment create a Court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a Court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision is a best a nullity. Court must exercise the jurisdiction and powers vested in them...." (Emphasis).

29. Further in the case of **Republic vs. Business Premises Rent Tribunal & another Ex-parte Albert Kigera Karume (2015) eKLR;**

In this case the court held that:-

"Whereas the current Constitution in Article 163(3) seems to deal only with the binding force of the decisions of the Supreme Court, it is my view that good order and proper administration of justice as well as the common law doctrine of stare decisis dictate that lower courts adhere to the decisions of courts of superior hierarchy where legally acceptable circumstances exists. As was appreciated by Musinga, J as he then was in Rift Valley Sports Club vs. Patrick James Ocholla Nakuru HCCA No. 172 of 2002 (2005) eKLR:

"The Learned magistrate trashed such a forceful decision of the Court of Appeal by failing to give it any consideration at all and proceeded to grant an injunction in a ruling which was devoid of any legal reasoning. A judicial decision must be based on proper legal grounds but never on feelings alone, no matter how strong such feelings may be. The doctrine of stare decisis is very important in our judicial system and must be respected as much as possible otherwise judicial decisions would be chaotic and unpredictable. It was unfortunate that the learned magistrate totally disregarded a five Judge binding decision without citing any reasons for doing so."

30. In support of the argument that this court lacks jurisdiction to hear and determine this matter the 4th Respondent referred to the case of **Okiya Omtatah Okoiti & another vs Attorney General & 2 others (2015) eKRL.**

In this case the court held at paragraphs 10,11,12,59,72,73,74 and 75 that:-

"In support of the argument that this Court has no jurisdiction in this matter, the Respondent cited that decision in the **Owners of Motor Vessel "Lillian S." vs Caltex Oil Kenya Ltd (1989) KLR 1 in which it was held that a Court cannot take any further step the moment it holds that it has no jurisdiction. Also cited in support of the Respondent's case is the statement of Ojwang, J (as he then was) in **Boniface Waweru vs Mary Njeri & another H.C. Misc. Application No.639 of 2005 (unreported)** that:-**

"Jurisdiction is the first test in the legal authority of a court or tribunal, and its absence disqualifies the court or tribunal from determining the questions."

This Court was also referred to the decision of the Supreme Court in the matter of the Interim Independent Electoral Commission (2011) eKLR, where it was stated:-

"[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by Statute Law, and by Principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in **Owners of Motor Vessel & "Lillian S." vs Caltex Oil Kenya Ltd (1989).**

[30] The "Lillian S." vs Caltex Oil Kenya Ltd (1989); case establishes that jurisdiction flows from the law, and the recipient court is to apply the same with any limitations embodied therein....in the case of the Supreme Court, the Court of Appeal and High Court, these respective jurisdiction are donated by the Constitution."

31. In this petition there is no dispute that the subject matter was subjected to litigation before Court of Appeal and Supreme Court and final decision made. The matter is now back at the High Court on same and/similar issues. In my mind I have no doubt that the doctrine of stare

decisis dictate that lower courts adhere to the decisions of courts of superior hierarchy where legally acceptable circumstances exist. This court has no supervisory jurisdiction over superior courts nor can it sit on appeal on decisions of superior courts. I find that this court is bound by the decision made by the Court of Appeal and Supreme Court regarding this matter and as such this court cannot disregard decisions of superior courts over the same subject matter.

32. In view of the above I am satisfied that the 4th Respondent's Notice of preliminary objection is meritorious. I find that this court lacks jurisdiction to hear and determine both the petitioner's Application and petition. The petitioner's petition and Application is bad in law, incompetent, misconceived and an abuse of the process of the court.

33. The petition and the Application is accordingly dismissed with costs to the Respondents.

Dated, signed and delivered at Nairobi this 29th day of April, 2020.

Justice J.A.Makau.