Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties) (Petition 369 of 2019) [2020] KEHC 3905 (KLR) (Constitutional and Human Rights) (30 July 2020) (Ruling)

Adrian Kamotho Njenga v Attorney General; Judicial Service Commission & 2 others (Interested Parties) [2020] eKLR

Neutral citation: [2020] KEHC 3905 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 369 OF 2019

LA ACHODE, JA MAKAU & EC MWITA, JJ

JULY 30, 2020

BETWEEN

ADRIAN KAMOTHO NJENGA ..... PETITIONER

AND

ATTORNEY GENERAL ..... RESPONDENT

AND

JUDICIAL SERVICE COMMISSION ..... INTERESTED PARTY

CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT ..... INTERESTED PARTY

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

RULING

1. On 6th February 2020, this court handed down its decision in a petition brought by Adrian Kamotho Njenga, who was the petitioner, against the Attorney general, the respondent, and the three interested parties. The court made several declarations in that judgment.

2. Thereafter, on 24th February 2020, the applicant took out a motion on notice, dated and filed on the same day, seeking a number of orders, as follows;

    a) That a finding be made that by failing to appoint persons recommended for appointment as judge of the court of Appeal on 22nd July 2019; judge of the Environment and Land Court

and judge of the Employment and Labour Relations Court on 13th August 2019 respectively within 14 days, the respondent is in breach of the orders of this Honourable court issued on 6th February 2020.

b) That a finding be made that the appointment of the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of Employment and Labour Relations Court on 13th August 2019 respectively, having fallen due upon lapse of the 14 days' appointment window, and the appointing authority having failed to act as per the constitution, the appointments have legally ripened and constitutionally crystalized.

c) That the respondent be directed to within 3 days publish for general information of the public in the Kenya Gazette, the names of the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively.

d) That in the event of failure by the respondent to within 3 days publish in the Kenya Gazette the names of the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively, the names of the said persons be immediately published by the 1st Interested Party, within 3 days in any newspaper of nationwide circulation.

e) That upon publication of the names of the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of the Employment and labour Relations Court on 13th August 2019 respectively, the 2nd respondent do within 3 days administer the oath or affirmation of office, in the manner and form prescribed by the Third Schedule to the Constitution to the said persons.

f) That the Chief Registrar of the Judiciary be directed to execute any document or legal instrument necessary for the full and proper assumption of office by the persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively.

g) That he Controller of Budget be authorized to approve withdrawal of funds from the Consolidated Fund as per the prescribed legal terms, to facilitate the full and proper assumption of office by persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of the Employment and Labour Relations Court on 13th August 2019 respectively.

h) That the Inspector General of National Police Service be directed to provide the requisite security arrangements as per policy, for the full and proper assumption of office by persons recommended for appointment as judge of the Court of Appeal on 22nd July 2019; judge of the Environment and Land Court and judge of the Employment and Labour Relations court on 13th August 2019 respectively.

3. The motion was premised on the grounds appearing on its face and on the applicant's affidavit also sworn on the same day, 24th April, 2020. According to the applicant, the court, in its judgment of 6th February, 2020, pronounced that appointment of persons recommended by the Judicial Service Commission (JSC), the 1st Interested party, as judges of superior courts, is immediate and, in any case,

within 14 days from the date of such recommendation; that the President is constitutionally bound by the recommendations of the JSC; that failure to appoint the persons recommended for appointment violates the *Constitution* and that continued delay to finalize the appoint violates the *Constitution* and the law.

4. The applicant's case is that even though the judgment and decree of the court has not been stayed, varied or set aside, the respondent has failed or refused to gazette the Judges recommended for appointment; that the respondent is in persistent contempt of the constitution and that he is willfully disobeying court orders.

5. In the supporting affidavit, the applicant has basically deponed that the appointment of the Judges should be immediate and not later than 14 days of the recommendations; that the appointment should have actualized by 20th February, 2020; that the respondent has refused to appoint the Judges in utter disregard of the *Constitution* and the law, and that he has failed or refused to abide by the judgment of the court.

6. The applicant further stated that although the respondent lodged a Notice of Appeal against the decision of the court, such a notice does not operate as stay of execution of that judgment. He urged that unless the orders sought are granted, impunity will be propagated.

7. The respondent filed a notice of preliminary objection to the motion on 10th March, 2020. He contended that the court has no jurisdiction to hear and determine the application, on the basis that it is functus officio. He did not, however, file a replying affidavit to the motion.

8. The respondent filed written submissions dated 11th March, 2020 and filed on 12th March, 2020, in support of the preliminary objection.

9. On the issue *functus officio*, the respondent submitted that the court having rendered its final judgment on the claims and prayers in the petition, the applicant cannot re-open that petition given that one of the orders sought in the motion, was sought in the petition and was declined.

10. The respondent argued, therefore, that upon issuing its final judgment, the court became *functus officio* and it ought not revisit its decision and grant orders that had been declined. He relied on the decision in *re the estate of Kinuthia Mahuha (deceased)* [2018] eKLR which cited *Telkom Kenya Ltd v John Ochanda (Suing in his own behalf and on behalf of 196 former employees of Telkom Kenya Ltd* [2014] eKLR, for the submission that functus officio is an enduring principle of law that prevents the reopening of a matter before a court that has rendered a final decision on the matter. It is the respondent's submission that based on the above principle; this court is precluded from granting the orders sought in the application.

11. The respondent further argued that the nature of declaratory orders is that they have no coercive effect and cannot be enforced against the respondent in the manner proposed in the motion. He relied on *Johana Nyakisoyo Buti v Walter Rasugu Omariba & others* (CA No. 182 of 2016), for the submissions that a declaration or declaratory judgment merely declares what the legal rights of the parties to the proceedings are; has no coercive power and does not require one to do anything.

12. The respondent also relied on *Republic v Cabinet Secretary for Internal Security – Experte Gregory Oriaro Nyauchi & 4 Others* [2017] eKLR, for the submission that a declaration is a formal statement by the court, pronouncing upon the existence or non-existence of a legal or constitutional state of affairs; declares what the legal position is and what the rights of the parties are, but does not contain an order which can be enforced against a respondent. It is not a coercive remedy.

13. According to the respondent, one of the orders sough in the motion cannot be granted since the court did not grant it in the petition. He relied on *Coastal Bottlers Ltd v Chrispinus Omondi* [2020] eKLR, for the submission that a prayer made and not specifically granted is deemed dismissed; *Gilbert Mokaya Ombuki v Kenya Ports Authority* [2020] eKLR, for the submissions that as the relief was not granted, the applicant was by his application, seeking to gain more than had been granted in the judgment, and *Ken Freight (EA) Ltd v Benson K. Nguti* [2015] eKLR, for the argument that what the applicant sought in that case were prayers that had not been granted by the court in its judgment.

14. Regarding the applicant's position that he, (respondent), had not sought stay of execution of the judgment, he contended that such an argument was not tenable. He relied on the Supreme Court of Nigeria's decision of *Chief R.A Okoya v S. Santill & Others* [1990] All NLR 250. 3, and Jamaican Supreme Court decision in *Norman Washington Manley Bowen & Shahine Robinson & another* [2015] JMCA Civ. 57, for the submission that a defendant who has filed an appeal against a declaratory judgment or order is not entitled to apply for a stay of execution of that judgment or order because a declaratory judgment or order has no coercive effect and threatens no one.

15. The respondent went on to argue that even though no stay had been sought, that did not entitle the applicant to institute and prosecute the present application. He urged the court to dismiss the motion.

16. The applicant filed written submissions dated 6th May 2020, in opposition to the preliminary objection and in support to the motion. He submitted that the respondent's preliminary objection is defective because it predates the motion; that the preliminary objection assaults the motion on technicalities and that it is craftily couched as an issue of jurisdiction. He also argued that article 159(2) (d) of the *constitution* cannot resuscitate the preliminary objection. Article 159(2) (d) provides that one of the principles to guide courts and tribunals when exercising judicial authority is that justice should be administered without undue regard to procedural technicalities.

17. Regarding the respondent's submissions, the applicant argued that the respondent did not respond to the specific issues raised in the motion. He contended that the application seeks to enforce the judgment and decree of the court but does not seek to reopen the concluded petition. In the applicant's view, the fact that the court did not reproduce the prayers as sought in the petition when issuing its judgment, did not mean the reliefs were declined. He contended that by terming the court *functus officio*, the respondent was trying to dissuade the court from using its judicial forum for enforcement of the judgment.

18. Regarding the principle of *functus officio*, the applicant argued that the issue was addressed by the Supreme Court in *Raila Odinga & 2 Others v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR (Par. 20, 21) to the effect that the court reserves jurisdiction to enforce its judgments.

19. The applicant further argued that the respondent cited decisions that were not compatible with the present application. In his view, the respondent's argument that the declarations that were granted had no coercive effect suggests that the judgment of the court is without significant consequence or effect. He contended that the petition was allowed with specific and explicit orders and, therefore, the respondent's argument that the orders given had no coercive effect is a misapprehension of the law.

20. Relying on *Black's Law Dictionary* 9th Edition on the meaning of an order, the applicant submitted that all court orders embody a command, direction or instruction and are absolutely amenable to enforcement proceedings. He also argued, referring to rule 5(2) of the *Court of Appeal Rules*, that mere institution of an appeal does not operate as stay of execution, except when there is a formal order of stay issued by a court.

21. According to the applicant, the court orders were clear that the President is bound by recommendations of the JSC; that once the judgment was pronounced, the respondent was under obligation to act on the recommendations forthwith and that having failed to appoint the nominee Judges, the respondent has failed to comply with the court orders. He relied on *Shimmers Plaza Ltd v National Bank of Kenya Ltd* [2015] eKLR, on the duty of all persons and institutions to obey the law.

22. On what appropriate remedies are in the circumstances, the applicant cited *Justus Kariuki Mate & Another v Martin Nyaga Wambora & Another* [2014] eKLR, for the submission that when a litigant approaches the court seeking remedies for alleged breach of fundamental rights, the court is mandated to determine the grievances and issue orders as it may deem fit; that disobedience of court orders seriously undermines the rule of law; that every time a public officer or institution disobeys a court order, there should be no celebration and that disobedience of a court order should be treated as a funeral with compassion for the death of the rule of law.

23. The applicant also relied on *Republic v Returning Officer Kamukunji Constituency, Nairobi & Another* [2008] eKLR, for the submissions that just as nature abhors vacuum, the enforcement of the rule of law abhors vacuum or a gap in its enforcement; *Republic v Principle Secretary Ministry of Defence Ex-parte George Kariuki Waithaka* [2018] eKLR, where it was held that where there is a lacuna with respect to enforcement of remedies provided under the constitution or statute, an aggrieved party is left with no alternative but to invoke the jurisdiction of the court; that the court is perfectly within its right to adopt such procedure as would effectually give meaningful relief to the aggrieved party and that a court of justice has no jurisdiction to do injustice.

24. The applicant urged the court to be guided by the above decisions and jurisprudence and allow the application.

25. The 1st and 2nd interested Parties, though given time to file both their response and submissions to the motion, they did not do so.

26. The 3rd Interested Party filed written submissions dated 26th June 2020 in support of the application and in opposition to the preliminary objection. The 3rd interested party submitted that the court is not functus officio in this matter. According to the 3rd Interested Party, the declarations made in the decision of 6th February, 2020, cannot be read in isolation of the timelines within which the appointments were to be made.

27. It contended that the reasonable timelines within which the appointments were to be made is a constitutional position; that the judgment of the court must be understood in the context of the functions of the court qua decision maker and that a court declares rights; duties and awards relief for injury to legally protected interests.

28. It is the 3rd Interested Party's case, that in view of the declarations made on 6th July, 2020, the court has residual supervisory powers to superintend over the core issue of appointment of the nominated Judges within the timelines. It also argued that the residual supervisory jurisdiction avails the court authority to enforce its decision and, therefore, the respondent's contention that the court is functus officio does not hold.

29. In the 3rd Interested Party's view, the question of appointment of the nominated Judges still remains outstanding and the court cannot look away from this niggling concern. It has jurisdiction to provide legal answers to the issue. It relied on *Lepapa Ole Kisotui Ntulele Group Ranch 5 & Another* [2017] eKLR, in urging the court to assume jurisdiction and address the question of failure to appoint the

Judges within the timelines of 14 days. It argued, therefore, that the court is not functus officio to hear and determine the application.

30. The 3rd interested party went on to contend that disregard of court orders has become endemic. It relied on *Eastern Radio Service v Tiny tots* [1967] EA 312, where the Court of Appeal held that failure to give discovery and inspection may result in striking out of a suit. It urged this court to disregard the respondent's argument and the documents he filed, for continued violation of court orders with respect to timelines in this matter. It relied on *Malar Ltd v National Bank of Kenya Ltd* [2000] eKLR, where the plaintiff's pleadings were struck out for failure to adhere to court orders.

31. On whether the court has jurisdiction to entertain the application, the 3rd Interested Party answered in the affirmative. It argued that the issue of jurisdiction is three fold; original, supervisory and appellate jurisdiction, all of which are captured in article 165 of the *Constitution*. The 3rd Interested Party submitted that when rendering its decision on the petition, the court exercised its original jurisdiction under Article 165 (2) (d) (i), and since the appointments have not been made to satisfy that decision, the court retains residual jurisdiction to supervise compliance with its orders.

32. In that regard, the 3rd Interested Party asserted that the court can entertain any applications and that it is vested with jurisdiction to hear the present application. It urged that the preliminary objection be dismissed and the motion be allowed.

33. We have considered the application, the preliminary objection and the responses thereto. We have also considered submissions by respective parties and the authorities relied on.

34. The respondent raised a preliminary objection to the application. Ordinarily the preliminary objection should have been heard first, but due to exigencies of time, and as parties had no objection to both the preliminary objection and the application being heard together, we decided to deal with the two simultaneously to save on judicial time and resources.

35. That being the case, we will consider the preliminary objection first, and should it succeed, there will be no need to consider the motion as that will be the end of the matter. Should it however fall, we will then consider the motion on merit.

Preliminary objection

Whether the court is functus officio and lacks jurisdiction

36. The respondent has opposed the motion on grounds that this court cannot entertain it for reason that it is *functus officio* and, therefore, has no jurisdiction to hear and determine it. The respondent's core argument is that the court made a final determination on 6th February, 2020 allowing the petition and made certain declarations. In his view, the court is now functus officio and cannot entertain the present application since some of the orders sought in the application, were sought in the petition but were not granted. He relied on a number of decisions to support his position.

37. The applicant and the 3rd Interested Party opposed the preliminary objection. They contended that the court is not functus officio and has jurisdiction to hear the application and grant the orders sought. In their view, the respondent has violated the orders made on 6th February, 2020 and, therefore, the court has jurisdiction to deal with the issue of enforcement of its judgment. They also relied on a number of decisions to support their position, contending that the court has residual supervisory jurisdiction to deal with the application as a means of enforcing its judgment.

38. We have considered the respective arguments of the parties on this matter. What is before us is a notice of motion filed after the conclusion of a constitutional petition and delivery of the court's decision.

The notice of motion seeks not one but several orders. The respondent has opposed it arguing that the court is functus officio.

39. *Black's Law Dictionary*, 10th Edition, page 787, defines *functus officio*, thus:

> " [having performed his or her office]" (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."

40. The principle of *functus officio* implies that once a court passes a valid decision after a hearing, it no longer has authority to re-examine the matter and, therefore, cannot reopen the case. In other words, the authority of the court that has made such a decision has come to an end. This principle limits the authority of the court to take up such a case once it has pronounced the final order. The principle frowns upon reopening of litigation.

41. In that regard, the court of Appeal stated in *Telkom Kenya Limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)* [2014] eKLR, that;

> " Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon"
>
> The Court, however, went on to state that:
>
> > The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions..." (emphasis ours)

42. We note that this position resonates with the Supreme Court's observation in *Raila Odinga & 2 others v Independent Electoral and Boundaries Commission & 3 others* (*supra*), that:

> "(21) It is a legal and constitutional obligation of any Court, from the basic-level to the highest level, to preserve and protect the adjudicatory forum of governance, and to uphold decorum and integrity in the scheme of justice-delivery. It follows that the Court's jurisdiction, in oversight of the question of conscientious and dignified management of the judicial process, and in safeguarding the scheme of the rendering of justice, will not be exhausted until the Court is satisfied and it declares as much. Even though, therefore, the Court concluded the hearing of the Petition by delivery of judgment, its jurisdiction for upholding the dignity of the judicial process, and in relation to the proceedings of the Petition, remained uncompromised."(emphasis added)

43. According to the Supreme court, the compelling principle, must be to do substantive justice so that justice must not only be done, but must also be seen to be done in every litigation that comes before the court rather than lay emphasis on the preference to the principle of finality as the respondent urges.

44. Flowing from the above principles, although a court may adjudge itself *functus officio* and decline to hear a matter, that is not to say that court would have no jurisdiction to hear the matter.

45. Secondly, whether a court should hold itself functus officio is a question of fact to be determined according to the facts and circumstances of each case. In so far as this application is concerned, the

applicant seeks a number of orders and it is clear to us, and the respondent seems to state so in his submissions, that not all the orders sought in the motion were sought in the petition. Some of the orders sought in the motion were not the subject of the decision made on 6th February 2020 to render this court *functus officio* respect the entire motion.

46. Regarding this court's jurisdiction to hear this motion, we must state without any doubt, that a court of law cannot shirk its duty to deal with a matter presented before it for resolution, on some pretext or excuse that it has no jurisdiction. Jurisdiction is the core mandate of the court to determine cases or disputes presented before it.

47. In *Samuel Kamau Macharia & another v Kenya commercial Bank Limited & 2 Others* [2012] eKLR, the Supreme Court restated the position in *re the matter of Interim Independent Electoral and Boundaries Commission*, [2011] eKLR, that jurisdiction of a court of law flows from the Constitution or statute, and that a court cannot arrogate to itself jurisdiction through judicial craft or innovation. It cannot do so by way of endeavours.

48. In the same vain, and in our view, except where jurisdiction is expressly limited by the same constitution, or specific law, the court cannot, through some interpretive approach, oust or limit its own jurisdiction. Declining jurisdiction is a serious matter that cannot be taken lightly. For the foregoing reasons, we do not agree with the respondent that this court is functus officio or lacks jurisdiction to deal with the motion before it. We find no merit in the preliminary objection and we accordingly overrule it.

The Application

49. Having thus determined the preliminary objection, we now turn to consider the application. The Motion was brought under various articles of the *Constitution*, sections 3 and 5 of the *Judicature Act*, the *Civil Procedure Rules* and all other enabling provisions of the law.

50. As we stated from the outset, the motion seeks several orders. It is predicted on the grounds on its face and the supporting affidavit by the applicant. The grounds in support of motion and depositions in the affidavit are more or less the same.

51. The gravamen of the application is that in the judgment of 6th February, 2020, the court issued declarations including; that the President is constitutionally bound by the recommendations of the JSC regarding the persons to be appointed as Judges of superior courts, and that the timelines for making such appointments is 14 days on the recommendations being made, among other declarations.

52. According to the applicant, despite the declarations, the appointments have not been made in violation of the Constitution and the court orders. He therefore brought the present application saying he was doing so in an effort to enforce and actualize that judgment.

53. Neither the respondent nor the Interested Parties filed responses to the motion. However, the 3rd interested party filed written submissions in support of the motion, while the respondent filed written submissions opposing it.

54. We have considered the motion, the affidavit in support, and the arguments for and against it. We have also considered the authorities relied on by respective parties.

55. As we have already stated at the outset of this ruling, the motion seeks several orders. The first order sought is a finding that failure to appoint the persons recommended as judges of the superior courts, the respondent is in breach of the court orders issued on 6th February 2020.

56. The court issued a declaration that the President was constitutionally bound by the recommendations made by the JSC. The court also held that the reasonable time within which appointment should be finalized is fourteen days. The Court again issued a declaration that continued delay to appoint the persons recommended as judges of the respective courts is a violation of the Constitution.

57. The applicant's argument that failure to appoint the persons as recommended is a violation of the court's decision is, without a doubt, true. The respondent did not argue that the applicant was not factually correct in his contention that there is violation of the court's decision. In that regard, we find no difficulty in agreeing with the applicant that there is indeed violation of the court's decision, with respect to finalization of appointment of the persons recommended as judges of the various superior courts. We must however point out that the applicant wants the court to find that it is the respondent who is in breach of the court orders.

58. We must point out that the respondent does not appoint persons recommended as judges, and it has never been his mandate to do so. It is clear to us that the applicant has misapprehended the mandate of the respondent in so far as the appointment of judges of the superior courts is concerned. Since the court did not direct its decision to the respondent, we are not persuaded that the applicant has made a case for this court to grant such an order. For that reason; we are unable to make the finding the applicant seeks.

59. The applicant has again asked the court to find that the appointment of the persons recommended by the JSC has constitutionally crystalized. We resist this invitation. This court made a decision on being moved through a constitutional petition. It held that the recommendations of the JSC on the persons to be appointed to superior courts, is binding on the President. That being the case, this court cannot be moved by way of a motion to make what would clearly appear to us to be a declaratory order. We do not, therefore, agree with the applicant that this court can issue such an order through a motion as moved.

60. That is not all. The applicant has also asked the court to direct the respondent to publish names of the persons recommended for appointment as judges in the Kenya Gazette within 3 days and, in default, the 1st interested Party be directed to publish the names in a newspaper with nationwide circulation.

61. We are of the considered view that these orders cannot be granted in isolation of the order seeking a finding that the appointment of the persons recommended as judges of the various superior courts has crystalized. Only when such a declaration is made, would the court then consider whether to grant orders to gazette the names in the Kenya Gazette or publishing them in a newspaper, and whether that is a requirement.

62. The applicant further seeks an order directing that persons recommended for appointment as judges, be sworn in by the 2nd respondent, upon their names being published in the Kenya Gazette or a newspaper. We note that there is no 2nd respondent either in the petition or Application. That being the case, this court cannot direct a non-existent party to perform such an obligation.

63. The applicant also prays that the Chief Registrar of the Judiciary be directed to execute instruments, to enable the persons recommended assume office of judge; that the Controller of Budget authorizes withdrawal of funds to facilitate assumption of office by these persons and the that the Inspector General of Police do facilitate the judges' security.

64. We once again note that the applicant seeks substantive orders through this motion. That notwithstanding, the persons to whom these orders are to be directed are not parties to the matter. A

court of law should not act in vain by issuing orders against persons that are not parties to a suit or application. This may lead to difficulties in enforcing such orders.

65. Considering what we have stated above, and although it is clear that there is, violation of the *Constitution* and the law, this court cannot, however, grant what are obviously substantive reliefs through a motion. In the premise, the motion is declined and dismissed. We make no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2020.

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L. A. ACHODE

PRINCIPAL JUDGE

.....

J. A. MAKAU

JUDGE

.....

E. C. MWITA

JUDGE