



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CONSTITUTIONAL PETITION NO. 2 OF 2019

IN THE MATTER OF: ARTICLES 22 & 258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF ARTICLES 1, 10, 27, 47, 73 & 232 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF PROVISIONS OF THE PHARMACY AND POISONS ACT AND THE PUBLIC SERVICE COMMISSION ACT

BETWEEN

WAMBUA MAITHYA.....PETITIONER

VERSUS

PHARMACY AND POISONS BOARD.....RESPONDENT

AND

PHARMACEUTICAL SOCIETY OF KENYA.....1ST INTERESTED PARTY

DR. PIUS WANJALA.....2ND INTERESTED PARTY

DR. KAMAMIA WA MURICHU.....3RD INTERESTED PARTY

RULING

1. By a Notice of Motion dated 5th September, 2019, the 3rd interested party herein, **Dr Kamamia Wa Murichu**, seeks an order that this court be pleased to deliver the ruling on the 3rd interested party's application for recusal prior to and exclusive of the judgement in the main petition.

2. According to the said applicant, the mere fact that third court scheduled the delivery of the judgement on the main petition together with the ruling on the application for recusal on the same day is tantamount to the court having made up its mind to dismiss the application for recusal and devising a way of denying the 3rd interested party an opportunity to appeal in contravention of the 3rd interested party's right to fair hearing.

3. The 2nd interested party herein, **Dr Pius Wanjala**, opposed the said application based on grounds of opposition.

Determination

4. I have considered the foregoing. In my view, for the purposes of better understanding of the instant application, it is important to set out the chronology of events leading to the present decision.

5. These proceedings were commenced by way of a petition dated 6th February, 2019 which was filed on 7th February, 2019. Together with

the said petition, the petitioner filed a Notice of Motion in which he sought conservatory orders which *inter alia* prayed that the court stays the respondent's decision to exclude all potential applicants to the position of Registrar/CEO of the Pharmacies and Poisons Board. The Court however decided to proceed and hear the petition itself expeditiously rather than the said application. The Respondent however took issue with the jurisdiction of this court and in a ruling dated the said objection was disallowed on 27th March, 2019 after which the court granted leave to the petitioner to amend its petition and directed that the amended petition be filed and served before the end of that day and the Respondent was given 21 days to respond to the same. The Petitioner and the 2nd interested party were then directed to file and serve their submissions within 7 days of service of the Respondent's response and the Respondent was directed to file and serve its submissions within 14 days of service of the Respondent's submissions. The matter was then fixed for further orders on 27th May, 2019

6. Pursuant thereto the Petitioner's submissions were duly filed on 27th May, 2019. However, on the day of the mention on 27th May, 2019 the 2nd interested party informed the court that he was relying on the petitioner's submissions. Respondent on the other hand had not filed its submissions and sought seven days to do so an application which was granted and the matter stood over to 12th June, 2019 for further orders.

7. However, by an application dated 7th June, 2019, the 3rd interested party herein applied to be joined to these proceedings and application which the court directed to be served for directions on 12th June, 2019. On 12th June, 2019 the Petitioner, the Respondent and the 2nd interested party informed the court that all their submissions were on record and were ready to either take the judgement date or highlight the submissions. However, in light of the 3rd Respondent's fresh application and in order to accommodate him while also not unduly delaying the proceedings, the court directed that responses to the said application be made within 3 days and the parties be at liberty to exchange their submissions thereon within 7 days and fixed the matter for mention on 24th June, 2019. On 24th June, 2019 the parties, including the 3rd interested party herein informed the court that after discussing the matter they had agreed that the 3rd interested party comes on record and files his papers within 10 days and the matter was fixed for reservation of judgement date on 4th July, 2019.

8. Pursuant to his joinder, on 4th July, 2019, clearly outside the 10 days prescribed by consent of the parties, the 3rd interested party filed grounds of opposition to the amended petition. In addition, the 3rd interested party on the very day of mention filed an application seeking that this court recuses itself from this trial and transfers this matter to a different judge in a court station other than Machakos Law Courts for the purposes of hearing of the case. The 2nd interested party on the other hand had filed his replying affidavit on 12th June, 2019 together with his submissions. Once again in order to accommodate the 3rd interested party and despite opposition by the petitioner and the 2nd interested, this court directed the other parties to respond to the fresh application by the end of the day on 5th July, 2019 and fixed the matter for reservation of the date for the delivery of the ruling therefor on 8th July, 2019.

9. With a view to expeditiously determining this matter and since by the time the 3rd party was being joined to these proceedings the parties herein had filed all their pleadings and what was pending was the reserving of a date for delivery of the judgement, on 8th July, 2019 I directed that the court would schedule the delivery of the ruling on recusal and the main petition on the same day, 26th September, 2019. However, the 3rd interested party seems not to have been done yet. In the present application, brought by way of a Notice of Motion dated 5th September, 2019, the 3rd interested party now seeks an order that this court be pleased to deliver the ruling on the 3rd interested party's application for recusal prior to and exclusive of the judgement in the main petition.

10. When I gave the date for delivery of the ruling and/or judgement, I made it clear to the parties that the ruling on the recusal would be delivered first and depending on its outcome, the judgement on the main petition would then follow. In other words, it was clear that in the event that the court allowed the application for recusal, there would be no need to deliver the judgement on the main petition. It therefore follows that the delivery of the judgement in the main petition was dependent on the outcome of the decision on recusal. That in my view was the best way of disposing of the matter expeditiously since the parties had filed their pleadings in the main petition and nothing else was pending to be filed in respect thereof. Those directions were given in the presence of the parties' representatives and none of them took any issue with the same.

11. From the said direction, it was clear that the court had not determined the outcome of the application for recusal otherwise nothing would have prevented the court from delivering its decision thereon and reserving its reasons for a later date if it was not possible to give detailed reasons therefor. It is therefore mischievous and in bad faith for the 3rd interested party to allege, without any basis, that the mere fact that the court had scheduled the delivery of the said decisions on the same day, it must have made up its mind.

12. In this case learned counsel knew and ought to have understood the court's directions and if they did not, they ought to have sought a clarification of the same from the court. However, to keep quiet and wait until when a decision is about to be delivered and then apply for the arrest of a decision, in my view is a mischievous way of conducting legal proceedings. As legal counsel, advocates ought to advise their clients properly lest they be seen to be proxies of their clients when they make applications potentially meant to demean the administration of justice and bring the court into disrepute on clearly baseless allegations.

13. In this application what the applicant seeks is an order arresting the delivery of the judgement. The first issue is the propriety of a party intercepting the delivery of a reserved decision by filing an intervening application. In **The Matter of The Estate of George M'boroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself *inter alia* as follows:

“The Law of Succession Act, like section 3A of the Civil Procedure Act has a saving provision as to the court's jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”

14. Similarly, **Kimaru, J** in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 of**

2005 held:

“The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

15. In **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA** (as he then was) emphasised that it is a residual jurisdiction, which should only be used, *in special circumstances* in order to put right that which would otherwise be a clear injustice.

16. One of the instances in which the court exercises this residual power is in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.

17. Dealing with inherent powers of the Court it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.

18. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the *Civil Procedure Act* is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court and that the court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.

19. It follows therefore that the inherent jurisdiction as the name suggests is not donated to the Court by any legislation but underlie the very nature of the Court as a seat of justice which the Court ought to draw upon whenever necessary and when all else fails in order to ensure that justice is attained.

20. Accordingly, it is my view that in appropriate cases, the Court is entitled to arrest the delivery of a decision in order to do justice if circumstances warrant it. However, that is a jurisdiction which cannot be exercised in a superficial and casual manner. Arresting a judgement and any judicial process for that matter is a power which ought not to be exercised lightly. It can only be properly exercised after a lot of circumspection and soul searching by the judge. In this respect, **Sir Udo Udoma**, CJ in **Musa Misango vs. Eria Musigire and Others Kampala HCCS No. 30 of 1966 [1966] EA 390**, expressed himself as follows:

“Now it is unquestionable that, both under the inherent power of the court, and also under a specific rule to that effect under the Judicature Act, the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to the trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think that they will be successful in the end lies a wide region, and *the courts have properly considered this power of arresting an action and deciding it without trial as one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure.* They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff’s claims as a matter of law. It is evident that our judicial system would never permit a plaintiff to be “driven from the judgement seat” in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad.” [Emphasis added].

21. Therefore, whereas the powers to arrest the decision may be invoked, it is a power which ought to be invoked very sparingly and in exceptional circumstances and not to assist a person who is intent upon abusing the process of the Court. Being a discretionary power, as held in **Shah vs. Mbogo [1967] EA 116 at 123B**, the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.

22. In this case, the entry into these proceedings by the 3rd interested party was at a late stage of the proceedings when the parties had complied with the directions and were waiting for a judgement date. As soon as he was admitted to these proceedings, he took issue with the competency of this court to deal with this matter by applying for the of the court and for the transfer of the matter outside Machakos and while that was pending the delivery of the ruling, he has now filed this application seeking to arrest the judgement.

23. The history of this case reveals a party who is hell-bent at all costs to delay and obstruct the expeditious determination of this petition for reasons only best known to himself. By allowing this application this court will be falling into the traps of those machinations craftily contrived and executed by and on behalf of the 3rd interested party who unfortunately is not a substantive party to these proceedings. This court has accommodated the 3rd interested party at all stages of these proceedings to the detriment of the other parties. In **Republic vs.**

Pauline Maisy Chesang & 4 Others [2019] eKLR, this Court expressed the following sentiments:

“It is pathetic that learned counsel would rush to the Court with an application which has serious impact on administration of justice based on insufficient or clearly misleading instructions from a client...To make such wild allegations against the court in the hope that the court will recuse itself from the matter is in my view one of the greatest sins against the administration of justice and no court ought to entertain such frivolous grounds as a basis for giving in to the demands of litigants...With due respect to counsel for the interested party, this is one of the most frivolous applications seeking recusal of a judge that I have ever had the misfortune to listen to. It ought not to have been made at all. Legal Counsel ought to remember that it is not for no reason that they bear the title “counsel”. They are supposed to and are obliged to advice and counsel their clients on matters of the law. They are not just their clients’ mouthpiece but are also officers of the court. They must be at the forefront in upholding the dignity of the courts and the rule of law and ought not to simply allow themselves to be instruments through which otherwise frivolous and scandalous applications are made before the Courts particularly where such applications are made on baseless grounds. It is really a sad day for this country when advocates are used by their clients as the instruments through which...profiling of judicial officers is engineered.”

24. Some of the objectives underlying civil litigation as enunciated in sections 1A and 1B of the *Civil Procedure Act* are that to ensure that the parties are on an equal footing and to ensure that that cases are dealt with expeditiously and fairly and allot each case its appropriate share of the court’s resources, while taking into account the need to allot resources to other cases. It must be noted that time is the only resource courts have at their disposal and in my view the overriding objective aforesaid gives the court the powers to adopt case management systems that *inter alia* uphold the said objective. As was held by the Court of Appeal in Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229:

“In our view, the often quoted principle that a party should have his day in court should not be taken literally. He should have his day only when there is something to hear. No party should have a right to squander judicial time. Hearing time should be allocated by the court on a need basis and not as a matter of routine. Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice...in the case of *FREMAR CONSTRUCTION CO LTD v MWAKISITI NAVI SHAH 2005 e KLR* at page 6 where the Court said:-

“Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernible issues it would be farcical to waste judicial time on it.”

25. The decision to give the ruling and the judgement date on the same day as well this particular ruling was therefore in tandem with the said objective which the Court of Appeal in the case of Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010 held is *inter alia*:

“poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court’s view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.” [Underlining mine].

26. In this case, the applicant has not alleged that the delivery of the pending judgement would be an abuse of the court process. His complaint is simply that by delivering the pending decisions he would be denied an opportunity of appealing. First, by making the said statement, the applicant is mischievously pre-empting the court’s decision. That is clearly being callous of an applicant seeking justice before a court of law and reveals the applicant’s *mala fides*. Secondly, the applicant’s right of appeal against either the judgement or the ruling cannot be said to have been taken away since if properly advised nothing prevents him from appealing against both or either of the said decisions and seeking appropriate remedy in the meanwhile. It is not for this court to properly advice the applicant as the applicant is ably represented in these proceedings by counsel.

27. Having considered this application and the history of this case, it is my view and I find that to grant this application would be amounting to aiding and abetting the abuse of the court process which the applicant herein has consistently set out to achieve. His actions in these proceedings are clearly geared towards the obstruction of the course of justice an action that must be deplored by any court of law as not only being an abuse of the court process but may also render the applicant a vexatious litigant. The wise words of the Court of Appeal in J M Mwakio vs. Kenya Commercial Bank Ltd. Civil Appeal No. 156 of 1997 ought to act as a guide to the applicant herein. In that case the said Court expressed itself as follows:

“The appellant is a familiar figure in the Law Courts. He does not hesitate to institute litigation on any aspect of perceived breach of his rights. Whereas litigants are perfectly free to bring any number of suits they may so desire, they must understand that in doing so, they are bound to stick to the rules governing the conduct of litigation in courts... no consequence that flows out of the enforcement of law can be said to cause injustice. Moreover, it is a cardinal principle in the administration of justice that it is in the interest of all persons that there should be an end to litigation...The appellant must be told in no uncertain terms that no matter how many applications and suits he may institute in the courts seeking to recover the suit property, such attempts by him would be futile and a waste of resources since the dispute relating to the suit property has been heard and finally determined by competent courts. This appeal is indeed vexatious and amounts to an abuse of the process of the court and it is dismissed with costs....”

28. It is therefore my view that to accede to this application would be contrary to the overriding objective of litigation. It is also not lost to me that while the applicant seeks to arrest the judgement, there is no specific prayer seeking that the directions given regarding the delivery of

the pending judgement and ruling be reviewed and/or set aside. In the premises, the application as crafted is still-born since without setting aside the directions, the orders sought herein cannot be granted. To that extent the application is also misconceived.

29. In the premises this application fails and is dismissed with costs to be borne by the 3rd party applicant.

30. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 26th day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Miss Mwangi for Mr Kinyanjui for the Petitioner

Mr Kipkoge for the Respondent

Dr Wanjala the 2nd interested party

Miss Mbilo for Mr Omiti for the 3rd interested party

CA Geoffrey