



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTION AND HUMAN RIGHTS DIVISION

PETITION NO 158 OF 2017

ALBINO MATHOM ABOUT.....PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1ST RESPONDENT

PUNIT D VADGAMA2ND RESPONDENT

GIKERA & VADGAMA ADVOCATES.....3RD RESPONDENT

JUDGMENT

1. The petitioner and the 2nd and 3rd respondents have a dispute before the Advocate Disciplinary committee being Disciplinary Cause No 74 of 2014. The dispute was adjudicated upon by the Tribunal and in a judgment delivered on 1st August 2016, the 2nd and 3rd respondents were found guilty of unjustifiably retaining the petitioner's funds (a client) and falling to account for the funds. The cause was then fixed for sentence on 21st November 2016.

2. The 2nd and 3rd respondents felt aggrieved with tribunal's findings and filed judicial review proceedings in the High Court being Judicial Review No 349 of 2016 seeking to quash the tribunal's decision. The court heard the case but dismissed the judicial review case on 9th December 2016. No appeal was lodged against that decision.

3. The petitioner states that despite that decision, the 2nd and 3rd respondents have re-opened the issue in High Court Civil Suit No 544 of 2013(OS) and obtained and ex parte orders restraining the Tribunal from proceeding to sentence the 2nd and 3rd respondents for the offences they were found culpable of. The petitioner contends that the High Court in exercising its jurisdiction is bound to comply with the rule of law and not exercise jurisdiction it does not have under the constitution and that is bound to protect the petitioner's right to fair hearing in determining disputes in any litigation before it.

4. It is the petitioner's case, therefore, that by entertaining the 2nd and 3rd respondents' application seeking restraining orders and even granting that relief however temporary, the High Court was purporting to exercise supervisory jurisdiction over another High Court decision already made in the Judicial review proceedings. The petitioner contends that as a state organ, the Court is bound by the principles in Article 10 of the constitution when applying or interpreting any law to observe the rule of law, grant the petitioner equal treatment and equal protection before the law and fair hearing and determination of disputes and not to be subjected to orders of the High Court made against him without or in excess of its constitutional mandate under Article 165(6) of the constitution.

5. The petitioner avers that based on the above facts, his rights and fundamental freedoms have been violated in that under Article 165(6) the High Court had no jurisdiction to exercise supervisory powers in HCC No 544 of 2013(OS) to grant restraining orders thus interfering with enforcement of the Tribunal's decision in Disciplinary cause No 74 of 2014. He also states that the High Court is contravening the provisions of Article 50 of the constitution thus infringing the petitioner's right to fair hearing and just determination of the dispute in purporting to re-open an issue which has been conclusively and finally determined by the same High Court.

6. The petitioner, therefore, filed this petition and sought the following reliefs:-

a. A declaration that the High Court has no jurisdiction to exercise supervisory jurisdiction over the previous High Court decision in Judicial Review No 349 of 2016.

b. A declaration that the High Court has no jurisdiction or mandate to issue or reopen in other proceedings pending before it including High Court Civil Case No 544 of 2013, the issue of the 2nd and 3rd respondents' guilt or conviction as already

determined in the said High Court Judicial Review Suit No 349 of 2013, or interfere with the consequential sentencing of the 2nd and 3rd respondents pursuant to the said decision.

c. A permanent injunction restraining the 2nd or 3rd respondents from challenging the finality and conclusiveness of the said decision of the High Court in Judicial Review No 349 of 2016 or seeing to interfere with the enforcement thereof.

d. The costs of the petition be provided for.

2nd and 3rd Respondents' response

7. The 2nd and 3rd respondents filed a replying affidavit by **Stephen Njoroge Gikera**, sworn on 4th July 2017 and filed in court on the same day. **Mr. Gikera** deposed that the petitioner had advanced a loan to one **Garang Deng Aguer** in 2011 which was secured by Parcel of land LR NO.214/382. The loan was however not repaid and the petitioner instructed the 2nd and 3rd respondents' firm to institute recovery proceedings. He deposes that the 2nd and 3rd respondents filed **CMCC No. 4018 of 2013** which prompted **Garang Deng** to deposit **USD300,000** with the 3rd respondents' firm in order to forestall the proceedings and a consent was entered into for payment of the balance.

8. **Mr. Gikera** deposes that the consent was not honoured and the 2nd and 3rd respondents obtained orders for vacant possession of the security from **Garang Deng** which enabled the petitioner realize that security. According to **Mr. Gikera**, a dispute then arose over the ownership of money that had been deposited by **Garang Deng** which forced the 2nd and 3rd respondents to file interpleader proceedings in **HCCC No 544 of 2013 (OS)** for the court to determine who was entitled to the money, a matter that is still pending before the High Court.

9. **Mr. Gikera** further deposes that despite the fact that the interpleader was still pending before the High Court, the petitioner instituted a complaint through **Disciplinary Cause No 74 of 2014** against the 2nd and 3rd respondents and obtained a judgment in that disciplinary cause, but before sentence, the 2nd and 3rd respondents challenged that decision in **Judicial Review Case No 349 of 2016** which was however dismissed on grounds of incompetency of the application and lack of promptitude

10. **Mr. Gikera** denies that the issue decided by the High Court in the JR case is being re-opened in **HCC No 544 of 2013**, contending that **HCCC NO. 544 of 2013** was filed before the Disciplinary cause and so was also the JR case. He contends that the civil case is before a court of competent jurisdiction and he is of the view that the decision of the Disciplinary Committee is not final since the High Court is yet to decide the interpleader suit before it.

11. He contends that the 2nd and 3rd respondents took measures available in law and moved the High Court for stay of further proceedings before the Tribunal to allow the court make a determination on the interpleader proceedings; that the application was heard interpartes and the court issued an order on 31st January 2017 staying the Disciplinary proceedings pending the hearing and determination of the interpleader proceedings.

12. **Mr. Gikera** states that the High Court hearing the interpleader proceedings is not supervising the court that heard the Judicial review since the courts are exercising separate jurisdictions. He therefore concluded that there is no violation of rights or fundamental freedoms of the petitioner.

Petitioner's submissions

13. **Mr. Oyatsi**, learned counsel for the petitioner, submits highlighting their written submissions dated 5th December 2017 and filed in court on the same day, that under Article 165(6) of the Constitution, the High Court has no supervisory jurisdiction over other Superior Courts. According to learned counsel, where the Court purports to exercise supervisory jurisdiction over a Superior Court, a party has a constitutional right to move this Court to seek interpretation as to whether such an act is constitutional. He contended that the right to move the Court for such interpretation is granted by Article 165(3) (d) (ii) of the constitution and that is what the petitioner has done.

14. **Mr. Oyatsi** further submits, referring to the genesis of the problem, that the petitioner filed a complaint against the 2nd and 3rd respondents before the Disciplinary Committee and that the complaint was heard and a judgment delivered in favour of the petitioner. According to learned counsel, the Tribunal is a court within the meaning of Article 169(1) (d) of the constitution or subordinate courts. He also contends that section 44 of the Evidence Act defines what judgment in rem is. In learned counsel's view, the Tribunal's decision conclusively determined the petitioner to be the rightful owner of the funds. This, submitted **Mr. Oyatsi**, is so because the 2nd and 3rd respondents sought a judicial review against the Tribunal's decision in **JR No 349 of 2016**, but in a judgment delivered on 9th December 2016, the JR Application was dismissed and there being no appeal, the finding of guilty by the Tribunal was final and what remained was sentence.

15. Learned counsel contends that against that background, the 2nd and 3rd respondents have now revived the interpleader proceedings in **HCCC No 544 of 2013** to determine the ownership of the same funds. It is **Mr. Oyatsi's** submission that after the decision in the JR case, the matter was conclusively determined as to the ownership of the funds hence the Court in **HCCC No 544 of 2013** could not issue orders suspending sentencing of the 2nd and 3rd respondents by the Tribunal. He therefore submits that in issuing stay orders in the interpleader proceedings, the High Court exercised its powers in contravention of the constitution hence those proceedings are invalid in view of the finality of the judgment of the Tribunal and that in the JR case. He contends that the only way the finality of those decisions could be challenged was by way of appeal which was not done.

2nd and 3rd Respondents' Submissions

16. **Mr. Odera**, learned counsel for the 2nd and 3rd respondents, submits also highlighting their written submissions dated 5th march 2018 and filed in court on 6th march 2018, that the interpleader proceedings were filed on 11th December 2013 asking the court to determine ownership of funds that were received by the 2nd and 3rd respondents who were acting as Advocates for the petitioner and the interpleader proceedings are still pending.

17. According to learned counsel, on 2nd May 2014, the petitioner filed a complaint before the Advocates Disciplinary Committee seeking among others, a determination over ownership the funds that had been received by the 2nd and 3rd respondents and to that extent, the complaint before the Tribunal was dealing with a matter that was already before the High Court. Learned counsel contends that in the JR case, the Court's judgment (at paragraph 49) made an observation about the tribunals' conduct despite there being another matter before the High Court over the same issue..

18. **Mr. Odera** further submits that the stay granted in the interpleader suit is not an appeal against the decision in the decision in the JR case but the order was directed at the Tribunal. Learned counsel contends that Article 165(6) allows the High Court to exercise supervisory jurisdiction over tribunals and, therefore, the order of stay was made purely for that purpose. He argues that the petitioner's allegations of violation of Article 27 had not been proved or even how Article 50 had been violated. Learned counsel was of the view, that when the High Court issued the order of stay, it acted within its powers. He therefore urges the court to dismiss the petition. Counsel for 1st respondent did submit thus left the matter to court.

Determination

19. I have carefully considered this petition, responses thereto; submissions by counsel for the parties and authorities relied on. In my view, the question that arises for determination is whether this court has jurisdiction to grant the reliefs sought in the petition.

20. The petitioner and 2nd and 3rd respondents had client/Advocate relationship. That relationship deteriorated due to the funds the 2nd and 3rd respondents had received from some transaction between the petitioner and one **Garang Deng** which they were holding. The 2nd and 3rd respondents filed interpleader proceedings before the High Court being **HCCC No 544 of 2013**, asking the Court to determine who the rightful owner of the funds they were holding was. That suit is still pending.

21. On his part, the petitioner moved to the Advocates Disciplinary Committee and launched a complaint which was heard and the 2nd and 3rd respondents found culpable. They moved to the Judicial Review Court in **JR No 349 of 2016** which was however dismissed on 9th December 2016. The reason for dismissal was that the application was not filed promptly. The 2nd and 3rd respondents then filed an application for stay in High Court **HCC No 544 of 2013** and obtained an order staying proceedings before the Tribunal. The petitioner now contends that the High Court did not have jurisdiction to grant the order of stay which, in the petitioner's view, amounted to supervising the Court's decision in the JR case since the matter had been conclusively determined by both the Tribunal's decision and that of the Court in the JR case.

22. From the above discourse, the petitioner's case is that the High Court sitting in **HCCC No 544 of 2013** could not issue an order of stay and in doing so its order amounted to supervising another Superior Court contrary to Article 165(6) of the constitution.

23. It is not in doubt that jurisdiction of the High Court is granted by Article 165(3) of the constitution. Article 165(3) (d) (ii) confers on this Court jurisdiction to determine the question whether anything said to be done under the authority of the constitution or of any law is inconsistent with and in contravention of the constitution. This court, therefore, exercises its constitutional powers when dealing with any dispute brought before it including any constitutional question that is brought before it for resolution.

24. However for the Court to deal with a constitutional question either of breach of the constitution or violation or infringement of human rights and fundamental freedoms, parties are required to plead with a certain degree of precision and show the rights violated, infringed or threatened, with infringement or violation; the manner of infringement and the constitutional provisions said to have been violated or are threatened with violation. This is a cardinal principle of pleading in constitutional litigation. There are many authorities in this respect but suffice to refer to these few.

25. In the precedent setting case of **Anarita Karimi Njeru v Republic** [1979] KLR 154, the court stated that; **"if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."**

26. The same view was expressed in **Meme v Republic** [2004]1 KLR637, where the court again observed that;

"where a person is seeking redress from the High Court on a matter which involves a reference to the constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."

27. In the case of **Saili v National Commissioner of South African Police Service & others** [2014] ZACC19, the Constitutional Court of South Africa observed that it is a fundamental principle of constitutional litigation that there be accuracy in the identification of the provisions of the constitution that are said to have been infringed on the basis that the breach is inconsistent with the Constitution or fundamental freedoms. The court emphasised that the constitutional challenge must be explicit, with due notice to all those affected in order to ensure that all interested parties have an opportunity to suitably respond to the allegations and lead relevant evidence, where necessary. (See also **Phillips & others v National Director of Public Prosecutions** [2005] ZACC 15; 2006(1) SA 505(CC),

28. The Court of Appeal was did also observed in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR, that; the principle in Anarita Karimi Njeru v Republic underscores the importance of defining the dispute to be decided by the court. The Court was, however, of the view, that precision is not the same as exactitude. It pointed out that procedure is a handmaiden of just determination of cases; that cases cannot be dealt with justly unless parties and the court know the issues in controversy and that pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. In that respect, the court observed, the principle in Anarita Karimi Njeru that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of the principle of fair hearing.

29. And the Supreme Court added in Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, that;

“[349]... Although Article 22(1) of the Constitution gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...” (Emphasis)

30. The petitioner’s grievance, as I understand it, is that the High Court in HCCC No 544 of 2013 erred and violated the constitution when it granted stay orders against the Tribunal’s decision which, in their view, was a final and conclusive determination of the parties’ rights in that dispute. The petitioner and his counsel support this view arguing that the tribunal’s decision was supported by the High court’s decision in JR No 349 of 2016 which was not, in any case appealed against. They, therefore, urge this Court to declare that the High court had no supervisory power over the court’s decision in the JR case in terms of Article 165(6) of the constitution.

31. For purposes of this judgment, Article 165(6) provides that ***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.*** There is no doubt from the constitutional text, that the High Court has no supervisory jurisdiction over other Superior Courts. The only avenue available to one who may be dissatisfied with a decision of a superior court is that of appeal in the normal appeal process following the hierarchy of court structure.

32. In this petition, the petitioner was bound to show that the High Court in HCC No 544 of 2013 was exercising supervisory powers over the decision of another superior court, to wit, the High Court that sat in JR No 349 of 2016. However, from the materials placed before this court, I do not find such evidence. What the court in HCCC 544 of 2013 did was to issue an order staying proceedings before a Tribunal, subordinate court to it. The proceedings before the Tribunal are not the same as those before a superior court. The High Court sitting in HCC No 544 of 2013 obviously had supervisory powers over the Tribunal and could issue the orders when appropriately moved.

33. Secondly, even if the High Court in HCC No 544 had erred, this court as a court of concurrent jurisdiction, could not issue any orders directed at the court sitting in HCC No 544 of 2013 either declaring that that court had no jurisdiction or had acted improperly. This is so because the same Article 165(6) of the constitution that the petitioner relies on to urge this court to sanction the Court that issued orders in HCC NO. 544 of 2013, bars this court, a superior court, from exercising supervisory power over other superior courts including the court sitting in HCC No 544 of 2013.

34. There are a number of authorities to the effect that this court is only sitting as a constitutional court Division of the High court but does not have or exercise special jurisdiction over other superior courts either of concurrent jurisdiction or of superior jurisdiction to it simply because it is sitting as a constitutional division.

35. As the Court of Appeal held in Peter Muiruri v Credit Bank Limited and others (Civil Appeal No 23 of 2003) on the same issue but in the repealed constitution;

“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 parts thereof does not talk about a Constitutional Court. Instead it talks about the High Court..... The 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 at best a nullity. Courts must exercise the jurisdiction and powers vested in them....” (Emphasis)

36. The above decision has been followed in many decisions including Philip Moi v Pluda Moi (Petition No 65 of 2012); Robert Mwangi v Catering Ltd and another [2012] eKLR, Robert Alai Onyango v Cabinet Secretary in charge of Health & 7 Others [2017] eKLR) and Construction and Contracting limited v Attorney General & another [2018] eKLR), all holding that this court, sitting as a constitutional Division of the High Court, has no supervisory jurisdiction of courts of concurrent jurisdiction or other superior courts.

37. Bearing the above authorities in mind, I have carefully considered the facts of this petition as well as the prayers sought. It is clear to me that they could only be grounds of opposition to the application in HCC No 544 of 2013 or the suit itself, but cannot found a constitutional

challenge to the court's jurisdiction to grant stay of the proceedings before the Tribunal or that court's jurisdiction to hear and determine the dispute in *HCC No 544 of 2013*. Alternatively, if the petitioner found it strange that the High Court had granted stay without jurisdiction, or that the court was supervising another superior court, he should have appealed against that order. The petition raises neither a constitutional issue nor violation of rights and fundamental freedoms.

38. In the circumstances, therefore, I find no merit in this petition. Consequently, the petition is declined and dismissed with costs to the respondents.

Dated, Signed and Delivered at Nairobi this 30th day of November 2018

E C MWITA

JUDGE