



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT MISC. APPLICATION NO. 86 OF 2016

ALVIN KAMANDE NJENGA..... APPLICANT

AND

JUSTICE GACHERU.....RESPONDENT

RULING

1. By a Chamber Summons dated 18th February, 2016, expressed to be brought under the provisions of the Constitution of Kenya, the *Civil Procedure Act*, Cap 21, the *Civil Procedure Rules* and all other enabling provisions of the Law, the applicant herein, **Alvin Kamande Njenga**, seeking an order that **Justice Gacheru** be barred from hearing cases concerning the applicant and specifically ELC No. 512 of 2008.
2. According to the applicant, there is a complete disagreement between him and the Judge over the manner in which the ELC matter is being conducted and his attempts to put forward his case have been thwarted by the Judge. He averred that the Judge was not obeying the fundamental law of the rules of natural justice and was giving more attention to counsel with the intention of delivering a wrong judgement.
3. The applicant went further to accuse the Judge of supporting what was in his view a fraudulent act by another Judge, **Justice Mutungi**, who previously heard the matter and who the applicant similarly, accused of refusing to allow the applicant put forward his case.
4. In his view the learned Judge ought not to have directed the parties to proceed by way of written submissions and that the said directions denied him the opportunity to reply to the contents of the replying affidavit and to cross-examine the deponent of the replying affidavit.
5. The Court was also accused of refusing to allow the applicant place on record some documents which were allegedly missing from the record. There were other issues raised by the applicant which according to the applicant were irregular.
6. Before any Court or Tribunal proceeds to determine a matter before it on merits, it is important for it to be satisfied that it has the jurisdiction to entertain the application. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1 Nyarangi, JA** expressed himself as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and

nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.....Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

7. In the same vein the same Court in Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 expressed itself as follows:

“The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.” [Underlining mine].

8. Similarly the Supreme Court in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR expressed itself as follows:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

9. It is therefore clear that even where jurisdiction is not raised that does not necessarily confer jurisdiction on the Court if it has none. It is for this reason that an issue of jurisdiction may be raised at any stage of the proceedings even on appeal though it is always prudent to raise it as soon as the occasion arises.

10. It is not in doubt that **Hon. Lady Justice Gacheru** is a Judge of the Environment and Land Court (hereinafter referred to as the ELC) established under Article 162(2) (b) of the Constitution of Kenya.

11. By virtue of Article 162 (1) of the Constitution, the ELC is a superior Court just like the Supreme Court, the Court of Appeal, the High Court and the Employment and Labour Relations Court set up under Article 162 (2) (a) of the Constitution.

12. The matter before me is however not clear on the nature of the cause it is, since the cause was simply originated by way of Chamber Summons in a Miscellaneous Application. For some reasons, the registry was of the view that it was a judicial review application. Assuming without deciding that it was so, the Constitutional underpinning for applications for judicial review is Article 165(6) of the Constitution which provide as follows:

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.

13. It is therefore clear that the High Court does not have supervisory powers over the ELC. Under Article 162(2) the ELC is a Court with the same status as the High Court. Under Article 160(1) of the Constitution the judiciary is subject to the Constitution. In other words the powers of the judiciary must be exercised within the Constitution. It therefore follows that where the Constitution expressly divests or limits the powers of the judiciary or any Court for that matter, the Court has no power to embark on such unconstitutional voyage.

14. In this particular case Article 165(6) of the Constitution expressly forbids this Court from supervising the superior courts and the Respondent herein being a Judge of such Superior Court this Court cannot undertake an action whose effect would amount to supervising the Respondent in the manner of conducting her judicial functions. No authority has such powers and a decision of such a Court can only be set aside on review by the same Court or on appeal to a higher court, but certainly not by a Court of concomitant jurisdiction.

15. For this Court to make an order barring **Hon. Lady Justice Gacheru** from hearing a case before her would amount to supervising the learned Judge. Under Article 160(1) of the Constitution:

In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.

16. Not even the Chief Justice is empowered to direct a Judge on the manner of exercising of his or her judicial authority. This was reaffirmed by the Court of Appeal in **Uhuru Highway Development Limited vs. Central Bank of Kenya Limited & 2 Others Civil Appeal No. 36 of 1996** where the Court expressed itself as hereunder:

“A Judge of the Superior Court runs his court in his own way and he is not under the directions of the Chief Justice in regard to the findings or observations on any matter before him.”

17. In a similar fashion, the same Court in **Mary Anne Njuguna vs. Joseph Njuguna Ngae Civil Application No. Nai. 195 of 1997** held that the Chief Justice cannot direct a Judge to overrule himself.

18. In arriving at my determination I am supported by the position adopted by **Mumbi Ngugi, J** in **Robert Mwangi vs. Shepherd Catering Limited & Another[2012] eKLR, Mumbi, J** who relied on **Peter Nganga Muiruri vs. Credit Bank Limited & 2 Others Court of Appeal Civil Appeal No. 203 of 2006** and **Philip Kipchirchir Moi vs. Attorney General & Another Petition No. 65 of 2012** and expressed herself as follows:

“It is therefore made manifestly clear by the Constitution, from which judicial authority is

derived, that the High Court has no jurisdiction to supervise the Supreme Court, the Court of Appeal, the Industrial Court or the Environment and Land Court established under Article 162(2) of the Constitution, or any Division of the High Court...If I understand Mr. Odera correctly, his contention is that this Court as a Court in the Constitutional and Human Rights Division, in exercising the original jurisdiction conferred on the High Court under Article 165, can supervise even the Supreme Court and the Court of Appeal on matters of procedure. Even without reference to the existing judicial authorities on this point, this is not only an argument that flies in the face of clear constitutional provisions but is a totally fallacious argument that, taken to its logical conclusion, would lead to complete absurdities and reduce our judicial system into a comical farce...If a party is dissatisfied with a decision or conduct of a judge sitting in any Division or station of the High Court, and alleges that there has been a violation of his or her constitutional rights, the alleged violation must be raised before the judge of the High Court seized of the matter. If the party is still not happy with the decision of that Court, then his or her remedy lies in the Court of Appeal, and from there, the Supreme Court, as provided in the Constitution and the relevant legislation. These are the Courts in our system of courts to which appellate jurisdiction is vested...A judge sitting in the Constitutional and Human Rights Division has the same jurisdiction as any other judge sitting in any other Division of the High Court. To ask such a judge to adjudicate in a matter that is before another judge of the High Court is to ask the judge to act in a matter that he or she has no jurisdiction over, and for the judge to do that is to engage in a nullity...I think I need say no more in this matter save that I will not engage in a nullity and purport to supervise the functioning and conduct or decision making by a court of competent and concurrent jurisdiction. The petitioner's application and the entire petition is an abuse of the court process and is hereby struck out with costs to the respondents."

19. I adopt the said holding as expressing the correct legal position in this matter. I similarly am of the view and so hold that this application is an abuse of the process of the Court. Where a party has an issue with a Judge or any judicial officer for that matter the well settled practice was set out by the East African Court of Justice in Attorney General vs. Anyang' Nyong'o and Others [2007] 1 EA 12 as follows:

"The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the Judge or the Judges in the presence of the opponent. The grounds for the recusal are put to the Judge or Judges who would then be given an opportunity, if sought, to respond to them. In the event of the recusal being refused by the Judge, the applicant would, if so advised, move the application in open court."

20. In my view an application seeking to have a Judge recuse himself or herself must be placed before the particular Judge for consideration and not before another Judge. A party aggrieved by the decision arising therefrom is thereafter at liberty to appeal to the appellate Court. As was held by the Court of Appeal in Kamlesh Mansuklal Damji Pattni & Another vs. R. Nairobi HCMA No. 322 of 1999:

"No recognised human right or fundamental freedom is contravened by a Judgement or order that is wrong and liable to set aside on appeal for an error of fact or substantive law... The remedy for errors of this kind is to appeal to a higher court and where there are no higher courts to appeal to, then no one can say that there was an error. The fundamental right is not a legal system that is infallible but one that is fair. It is only errors of procedure that are capable of constituting infringement to the rights protection and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to failure to observe one of the fundamental rules of natural justice."

21. In the result the order which commends itself which I hereby grant is that the chamber summons dated 18th February, 2016 is misconceived and is hereby struck out but with no order as to costs.

Dated at Nairobi this 23rd day of February, 2016

G V ODUNGA

JUDGE

Delivered in the presence of the applicant in person

Cc Patricia