Nkunja v Magistrates and Judges Vetting Board & another (Petition 154 of 2016) [2016] KEHC 7269 (KLR) (Constitutional and Human Rights) (20 May 2016) (Ruling)

Wilson Kaberia Nkunja v Magistrates and Judges Vetting Board & another [2016] eKLR

Neutral citation: [2016] KEHC 7269 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 154 OF 2016

I LENAOLA, J

MAY 20, 2016

BETWEEN

WILSON KABERIA NKUNJA ..... PETITIONER

AND

THE MAGISTRATES AND JUDGES VETTING BOARD ..... 1ST RESPONDENT

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

RULING

Introduction

1. In his Notice of Motion Application dated 11th April, 2016 the Applicant seeks the following orders;

    1. ....

    2. ...That pending the hearing and determination of this Application inter-partes, a conservatory order be issued staying implementation of the determination of the 1st Respondent's decision that the Petition/Applicant is not suitable to continue to serve as a magistrate and in particular restraining the 2nd Respondent from terminating the salaries and other entitlements that are due to the Petitioner/Applicant as a magistrate.

    3. That upon inter-partes hearing of this Application and pending the hearing and determination of the substantive Petition, the conservatory order in (2) above be confirmed staying implementation of the determination of the 1st Respondent that the Petitioner/Applicant is not suitable to continue to serve as a magistrate and in particular restraining the 2nd Respondent

from terminating the salaries and other emoluments that are due to the Petitioner/Applicant as a magistrate.

4. That the costs of this Application be provided for.

2. The Application was premised on the grounds that the 1st Respondent has made its final determination that the Applicant is not suitable to continue to serve as a magistrate and that the Applicant is challenging the said decision on a number of grounds including that:

   i. The determination took into account matters over which the 1st Respondent had no jurisdiction.

   ii. The determination was influenced by bias.

   iii. The determination was marred by a series of errors of fact.

   iv There was a lack of any analysis particularly of exculpatory matters that were before the 1st Respondent before it arrived at the eventual determination.

3. According to the Applicant, there is real and present danger that the 2nd Respondent may at any time implement the determination of the 1st Respondent and terminate the salaries and other emoluments that are due to him and that the lifespan of the 1st Respondent is running out by operation of the law and as a result therefore, it is only fair that the present matter be heard and determined.

4. It was therefore his argument that it is just and equitable that this Application be allowed and the conservatory orders sought be granted.

The 1st Respondent's Case

5. The 1st Respondent opposed the Application through an Affidavit in reply sworn on its behalf by its Secretary and Chief Executive Officer Mr. Reuben Chirchir on 25th April, 2016.

6. Mr. Chirchir deponed largely to the allegations raised in the Applicant's Petition and urged the Court to dismiss both the Petition and the present Application on the basis that they have no merit.

The 2nd Respondent's Case

7. Despite being served, the 2nd Respondent, for unknown reasons, did not in any way participate at the hearing of the present Application.

The Parties' Submissions

For the Applicant

8. Learned Counsel Mr. Ongoya, on behalf of the Applicant, submitted that in view of the issues raised in the Petition, the matter is a proper one for certification as raising a substantial question of law for reference to the Chief Justice to constitute a bench of an uneven Judges. Counsel argued in that regard that Section 23 (2) of the Sixth Schedule to the Constitution raises issues that have partly been interpreted by the Supreme Court but the question relating to removal of a magistrate while within this Court's jurisdiction, is an important question that will impact on other cases by magistrates that have been removed from service by the 1st Respondent.

9. While relying on the decision in *Anisminic Ltd vs Foreign Compensation Commission* [1968] APP. LR 12/17, it was Counsel's other submission that Section 23 (2) of the Sixth Schedule to the Constitution

limits the approach to Courts by Judges and Magistrates and submitted that a reading of the law must be as much as possible to open the doors of Courts to litigants and not to close them.

10. According to Mr. Ongoya, on a prima facie basis, the Applicant has an arguable case in that the Petition spells out violations under the Constitution and there is specifically clear evidence of bias on the part of the 1st Respondent. In that regard, Counsel argued that if the orders sought in the Application are not granted, the Applicant will lose his sole source of income including his capacity to sustain the present litigation. That the contemplated loss of income has a consequence of making the Applicant undignified. Further, that the present proceedings are proper in challenging the constitutionality of Section 23 (2) aforesaid and the Applicant has a right to defend the Constitution as well as his rights and that the issues raised herein are not idle and require further interrogation.

11. For the above reasons, Counsel urged the Court to grant the orders sought and a further order referring the matter to the Chief Justice for the constitution of a bench to hear and determine the Petition.

For the 1st Respondent

12. In its Written Submissions dated 25th April, 2016, the 1st Respondent submitted that under Article 23 of the Constitution, this Court has the jurisdiction, in appropriate cases, to issue conservatory orders for purposes of ensuring that the status quo of a matter is maintained and to enable parties litigating have an equal treatment and benefit of the law. That in the present case, the status quo is that the Applicant has already been determined to be unsuitable to continue serving in the judicial service and that the position may only change if the Court issues final orders as prayed for in the Petition.

13. Further, that the 1st Respondent's determination of the unsuitability of the Applicant is valid and enforceable unless it is set aside or quashed by the Court. That the determination was also reached pursuant to the Constitution and hence the legal validity of the determination must be respected and upheld under Article 3 (1) of the Constitution and furthermore, the 2nd Respondent in its duty to respect and uphold the Constitution may not retain a magistrate who has been determined to be unsuitable to continue to serve and on full salary and other benefits due and payable to magistrates unless the 1st Respondent's determination is first set aside or quashed.

14. The 1st Respondent also took the position that the balance of convenience does not lie in favour of a Magistrate, such as the Applicant, who has been determined to be unsuitable and that the propriety of that determination is what the Petition is about. That the Applicant predicates his Application on the fact that the life span of the 1st Respondent is running out by operation of the law but the truth of the matter is that the said lifespan does not in law affect the legal validity of its determinations. Accordingly, and in that regard, the Attorney General, as the Government legal advisor, is duty bound to defend its (1st Respondent's) determinations in Court, and that its final determination cannot be ignored simply because its lifespan has come to an end.

15. The 1st Respondent asserted that it would not be equitable or just for the Applicant to continue sitting and serving as a Magistrate pending the hearing of his Petition and there can be no justification for him to be paid any salary or emoluments accruing to a position in the judicial service from which he has been effectively removed. That conservatory orders will be granted at an interlocutory stage of proceedings only in the clearest of cases where there is obvious prima facie contravention of the Constitution in cases where for instance a quasi-judicial entity has acted outside its remit and denial of rights are evident on the face of the record. In that regard, it was its submission that the foregoing is absent in the present case and that even the allegations of breach of natural justice have to be proved in order for the jurisdiction of this Court to be properly invoked.

16. Learned Counsel Mr. Lubullelah, on behalf of the 1st Respondent, in regard to Article 165 (4) of the *Constitution,* submitted that the present matter is not different from any other matters before this Court filed by senior Judges of the Court of Appeal and the High Court and contended that although these other matters were heard by three Judges, a single Judge can handle the present matter and do justice to all Parties. According to Mr Lubullelah, the key question in the instant matter is the interpretation of Section 23 (2) of the Sixth Schedule to the *Constitution* and as such, that is a minor issue which this Court is capable of giving a legal interpretation sitting as a single Judge. That the Vetting of Judges and *Magistrates Act*, 2011 is still in place and pursuant to Amendment No. 40 of 2012 in Section 4 thereof, the powers of removal of a magistrate cannot be subject to challenge in any Court.

17. Counsel submitted further that the ouster clause in Section 23 (2) aforesaid is a statutory question and this Court cannot ignore that position. Further, that the said section is valid law and this Court is under an obligation to apply it unless it is struck out as being unconstitutional or illegal.

18. On jurisdiction, it was Mr. Lubullelah's submission that on a prima facie basis, this Court does not have the jurisdiction to determine the Petition and consequently cannot also grant the conservatory orders.

19. Further, that certain matters of fact raised in submissions and the evidence tendered before the 1st Respondent cannot be evaluated by this Court as it is not sitting as an appellate Court on its decision. Additionally, that from the record, there was sufficient evidence regarding the lack of integrity by the Applicant and in any event, if this Court were to re-open the evidence, without seeing the witnesses, it may reach a decision similar to that of the 1st Respondent.

20. Lastly, that since the jurisdiction of the 1st Respondent cannot be interrogated by this Court and since the Applicant was not undergoing a criminal trial before the 1st Respondent, the proof expected was not beyond reasonable doubt and that there is therefore no prima facie case disclosed and as such, the conservatory orders cannot issue.

Determination

21. The two issues for determination is whether the present matter should be referred to the Chief Justice for the empanelment of a bench of Judges to hear and determine the same and whether the conservatory orders sought in the Application should be granted.

22. I shall first address my mind to the question of conservatory orders. In that regard, under Article 23 (3) of the *Constitution,* an appropriate relief to be granted for breach of or threat of breach of fundamental rights and freedoms may include a conservatory order.

    What then is a conservatory order?

    In the Privy council case of *Attorney General vs. Sumair Bansraj* (1985) 38 WIR 286, Braithwaite J.A. expressed himself follows:

> "Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order

would not then be in the nature of an injunction, ... but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of ... the provisions" of the Constitution...In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously, with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) "subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have...the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too...The critical factor in cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state." (Emphasis added)

23. Further, in *Gatirau Peter Munya vs Dickson Mwenda Kithinji and 2 Others*,Application No. 5 of 2014 it was noted that:

> "(86) "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes." (Emphasis added)

24. Following the above expositions of the law, in *Martin Nyaga Wambora vs Speaker of The County Assembly of Embu and 3 Others*, Petition No. 7 of 2014, the principles for grant of conservatory orders were set out in the following terms:

> "(59) In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: '... [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.'"

The Court then added:

> "[60] To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention.

(61) The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.

(62) The third principle is one recently enunciated by the Supreme Court in the election petition case of Gatirau Peter Munya Vs Dickson Mwenda Githinji & 2 Others Sck Petition No 2 Of 2013. The principle is that the public interest must be considered before grant of a conservatory order. Ojwang and Wanjala JJSC stated that: "[86] 'conservancy orders' bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as 'the prospects of irreparable harm' occurring during the pendency of a case; or 'high probability of success' in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributable to the relevant causes"

(63) Thus, where a conservancy order is sought against a public agency like a legislative assembly that is mandated to carry out certain functions in the normal course of its business, it is only to be granted with due caution. The interruption of the lawful functions of the legislative body should take into account the need to allow for their ordered functioning in the public interest." (Emphasis added)

See also *Board of Management of Uhuru Secondary School vs City County Director of Education and 2 Others* [2015] eKLR.

25. It therefore follows that an applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is:

> An applicantmust demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution;Whether if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; andThe public interest must be considered before grant of a conservatory order.

26. Applying the above criteria to the present case, on a prima facie basis, I am satisfied that the applicant has a case with a likelihood of success. I say so because it is indeed true as submitted by Mr. Ongoya that whereas Section 23 (1) of the Sixth Schedule to the *Constitution* has been the subject of judicial determination including in Supreme Court Petition Nos. 13A, 14 and 15 (Consolidated),*Judges & Magistrates Vetting Board & 2 others vs Centre for Human Rights and Democracy and 11 others*,Section 23 (2) has never been the subject of such determination. The said Section provides as follows:

> 1. Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.

2. A removal, or a process leading to the removal, of a Judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court.

27. The question why Section 23 (2) does not contain the words "magistrate" is not idle and the question whether Section 22 (4) of the *Vetting of Judges and Magistrates Act* No. 2 of 2011 which reproduced Section 23 (1) in the context of Magistrates is prima facie a serious constitutional issue that requires interrogation by this Court. The Section provides that:

1. A judge or magistrate who has undergone the vetting process and is dissatisfied with the determination of the Board may request for a review by the same panel within seven days of being informed of the final determination under section 21(1).

2. The Board shall not grant a request for review under this section unless the request is based—

   a. on the discovery of a new and important matter which was not within the knowledge of, or could not be produced by the judge or magistrate at the time the determination or finding sought to be reviewed was made, provided that such lack of knowledge on the part of the judge or magistrate was not due to lack of due diligence; or

   b. on some mistake or error apparent on the face of the record.

3. A judge or a magistrate, who requests for review shall, pending the decision of the Board under this section, be suspended from office.

4. A removal or a process leading to the removal of a magistrate from office under this Act shall not be subject to question in, or review by, any court.

5. The decision by the Board under this section shall be final.

28. On whether the Petition would be rendered nugatory should the conservatory orders not be granted (because the 1st Respondent may cease to exist), I am unconvinced by the submissions by the Applicant on that issue. I say so with respect because, the Applicant, voluntarily submitted himself to the jurisdiction of the 1st Respondent. He did so at the first instance and, after his initial removal, by filing review proceedings which were rejected. The present proceedings are a challenge to that jurisdiction and in the present Application, the challenge can properly be presented whether or not the 1st Respondent is existent. It is in any event properly represented by Counsel and any favourable decision to him can be effected by the 2nd Respondent which is existent and will be for days to come.

29. Does public interest fall in favour of the Applicant? My answer to this question must be in the negative. I hold so because, following the promulgation of the Constitution, 2010, among the changes introduced was the vetting of magistrates and Judges which was duly undertaken pursuant to the Vetting ofJudges and Magistrates Act. The outcome of the said vetting process was that he is not suitable to continue serving as a magistrate. In that regard, it is not in the public interest for this Court to overturn the decision of the Vetting Board and reinstate the Applicant to all his terms of office without going into the merits of the Petition. Suppose the Petition fails after his salaries and emoluments are reinstated without him being lawfully in office? What public interest would such an action serve? I submit none. Infact the converse would be true.

30. Based on my opinion above, I am inclined not to grant any conservatory orders sought in the Application and would only add that I am unable to specifically restrain the 2nd Respondent from terminating the salaries and other emoluments that are due to the Applicant because he is not in office

by operation of the law, is not performing any judicial functions, and is not entitled to the said benefits until and if his Petition succeeds.

Whether this Matter should be Transferred to the Chief Justice for the Constitution of a Bench

31. Article 165 (3) (d) of the *Constitution* which vests this Court with jurisdiction provides that;

> Subject to clause (5), the High Court shall have jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of –
>
> i. The question whether any law is inconsistent with or in contravention of this Constitution
>
> ii. The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
>
> iii. Any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
>
> iv. A question relating to conflict of laws under Article 191. (Emphasis added).

32. Under sub-clause (4), the Article provides further that:

> Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

33. In Hon. *Chemutut and 3 Others vs the Attorney General and 3 Others*, Petition No. 307 of 2014, the Court appreciated the competence of a single Judge to handle any and all matters that goes before him or her. The Court observed that:

> " It must also be remembered that each High Court judge, has authority under Article 165 of the constitution to determine any matter that is within the jurisdiction of the High Court. There is a right of appeal to the Court of Appeal and by virtue of Article 163(4) of the Constitution, an appeal as of right to the Supreme Court on Constitutional matters, there must be something more to the substantial question than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts of the application of well-settled principled to the facts of a case."

34. The question regarding the circumstances under which a matter should be referred to the Chief Justice under Article 165(4) was however considered in the case of *Community Advocacy and Awareness Trust and Others vs Attorney General* Nairobi Petition No. 243 of 2011 (Unreported), where Majanja J noted that:

> "(8) The Constitution of Kenya does not define, "substantial question of law." It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine a matter ..... [10]... giving meaning to "substantial question" must take into

account the provisions of the Constitution and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter." (Emphasis added)

35. Furthermore, in *Chunilal V. Mehta vs Century Spinning and Manufacturing Co.* AIR 1962 SC 1314 it was acknowledged that:

> " A substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial." (Emphasis added)

36. In addition to the above, Odunga J. in *Peter Gichira vs The Attorney General and Others,* High Court Petition No. 313 of 2015 stated as follows:

> "(9) I have considered the issues raised in this petition. In my view the decision whether or not to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. This country, despite great strides made in the enlargement of the bench in the recent past still does not enjoy the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are still very scarce and although the time taken for hearing a petition by a single judge may not be any different from that taken by a bench empanelled pursuant to Article 165(4) of the Constitution, it must be appreciated that the empanelling such a bench invariably leads to delays in determining cases already in the queue hence worsening the problem of backlog crisis in this country." (Emphasis added)

37. Applying the foregoing principles to the present matter, at the core of the Petition, as I had stated earlier, is a question revolving around the interpretation of Section 23 of the Sixth Schedule to the Constitution which I reproduced elsewhere above.

38. I have perused the Petition herein and in the above context, it is apparent that the key question to be addressed is therefore in regard to the removal of a magistrate as a result of the vetting process as opposed to that of a judge as contemplated under Sub-clause (2) as reproduced above. In that regard, I am satisfied that whether the provision of the Vetting of Judges and Magistrates Act which ousts the jurisdiction of this Court to hear any reviews in regard to the removal of judges from office, as a result of the vetting process, also applies to magistrates and hence whether the same is in violation of Section 23 of the Sixth Schedule to the Constitution, is a substantial question of great public importance that has not been addressed by the highest Court in this country and the same calls for an in depth discussion of alternate views by an uneven bench of Judges.

39. I am thus satisfied that the present matter warrants the constitution of a bench of Judges under Article 165 (4) of the Constitution and as such, I hereby direct the transfer of this file to the Chief Justice for the empanelling of a bench to hear and determine the Petition herein.

Conclusion

40. It is indeed true that removal from any job and more so that of a judicial officer is traumatising and affects more than just the career of such an officer. However, the vetting of Magistrates and Judges has not been an easy nor painless experience for all affected. Removal, even more so. The vetting process was nevertheless imposed on judicial officers by the Kenyan people and the consequences were known to all, including the Applicant.

41. In the end, whatever my sympathies with the Applicant, I have shown why the orders sought cannot be granted.

Disposition

42. Based on my reasoning above, the Notice of Motion Application dated 11th April, 2016 is hereby dismissed with a further order that the matter be referred to the Hon. Chief Justice for the constitution of a bench of Judges under Article 165 (4) of the *Constitution.*

43. Each Party will bear its own costs.

44. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF MAY, 2016

ISAAC LENAOLA

JUDGE

In the presence of:

Muriuki – Court clerk

Mr. Lubullelah E. L. for 1st Respondent

Mr. Magina holding brief for Mr. Ongoya for Petitioner

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE