Mangla v Mutunga & another (Petition 220 of 2016) [2016] KEHC 7270 (KLR) (Constitutional and Human Rights) (16 June 2016) (Judgment)

Bryson Mangla v Willy Munyoki Mutunga & another [2016] eKLR

Neutral citation: [2016] KEHC 7270 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 220 OF 2016

JL ONGUTO, J

JUNE 16, 2016

BETWEEN

BRYSON MANGLA ..... PETITIONER

AND

HON. WILLY MUNYOKI MUTUNGA ..... 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 2ND RESPONDENT

JUDGMENT

1. The Petitioner who describes himself as a "free thinker, theologian and brighter- age philosopher" filed the Petition herein on 30th May 2016. The Petitioner, who appears propria persona, states that the Petition was filed on behalf of the general public.

2. In his Petition, the Petitioner seeks the following final reliefs:

The honourable court issue a temporary order barring the Chief Justice from retiring until Petition No. 136 of 2016 in the High Court is heard and determined and consequential ethic issues arising resolved in accordance with the law or,Order the 2nd Respondent not to release the Chief Justice for retirement on June 16th 2016 until such a time that the now obvious constitutional crisis in the Supreme Court composition has been permanently resolved.PARAGRAPH 3.

The Petition was apparently prompted by the 1st Respondent's decision to retire on the 16th June 2016. The 1st Respondent made the announcement himself in the year 2015.

4. According to the Petitioner, the 1st Respondent's retirement as the Chief Justice of the Republic of Kenya will lead to the Supreme Court being crippled as it will not be possible to constitute a bench

of five judges as dictated by Article 163(2) of the Constitution given the inevitable unavailability of two other judges of the Supreme Court. The Petitioner contends that this would interfere with the administration of justice should any appeals or cases end up in the Supreme Court.

5. The Petitioner also contends that the successor of the 1st Respondent in the office of the Chief Justice is already being influenced by external actors. He names the Attorney General and the National Intelligence Service as some of the external actors. For completeness, the Petitioner contends that common sense and public interest dictate that the 1st Respondent does not retire until two other judges are appointed to the Supreme Court.

6. The Respondents oppose the Petition. Through the Grounds of Opposition filed on 14th June 2016, the Respondents state that the Petitioner lacks the necessary locus standi and additionally that the Petition does not disclose any cause of action against the Respondents. Besides stating that the Petition is vexing and completely abstract, the Respondents also contend that the orders sought by the Petitioner are incapable of enforcement as the same would violate Article 167 of the Constitution.

7. By way of a brief litigation history, the hearing of the Petition had to be fast-tracked. In appreciation that the Petitioner was acting in person and in further appreciation of the fact that the event (retirement of the 1st Respondent) sought to be stopped by the Petitioner was to chance on 16th June 2016, I directed that the Petition be heard immediately and in any event on or before 15th June 2016. On the 15th June 2016, the parties consequently appeared before me and made their submissions on the Petition.

8. The Petitioner highlighted his submissions earlier filed on 13th June 2016. The Petitioner submitted that the 1st Respondents early retirement was not good for the country as the retirement would have an impact on any presidential election Petition filed in 2017. The Petitioner argued that the reasons advanced by the 1st Respondent for early retirement were not tenable and that public interest dictates that the 1st Respondent be restrained from retiring.

9. Ms. Mutua for the Respondents centred her arguments on the points that the Petitioner lacks the necessary standing to commence the Petition. The Respondents additionally submitted that the Petition is lacking in material detail. It was submitted that not only did the Petitioner have no cause of action but also the Petitioner did not have any specific interest. Finally, it was submitted that the orders sought would result in a violation of the 1st Respondent's constitutional rights under Article 167(1) as well as Article 30 of the Constitution.

10. Three issues emerge for determination. First, has the Petitioner the locus standi to file and prosecute the instant Petition? Secondly, does the Petition meet the competency threshold? Finally, is the Petitioner entitled to the orders sought in the Petition?

Locus standi

11. It is important to point out at the onset that the old stringent rules as to locus standi are no longer applicable in the current constitutional dispensation, more so, in relation to constitutional litigation. Public interest litigation has intertwined well with private law interest to give birth to a rather broad and liberal approach on the subject of legal standing. The provisions of Article 258 of the Constitution as read together with Article 22 has opened the gates to literally all litigants including the so called vexatious litigants. It is no longer a situation where the rules as to locus standi are strictly construed to end up with the proposition that only the Attorney General can sue on behalf of the public: see Maathai –v- Kenya Times Media Trust Ltd [1989] KLR 267.

12. The position is now that any person with a bona fide interest, whether directly or indirectly, may move the court and especially raise a constitutional question. There ought to exist though a semblance of good faith and interest. That clearly was in the Court of Appeal's wits when in the case of Mumo Matemu- v- Trusted Society of Human Rights Alliance & 5 Others C.A.C.A No. 290 of 2012, the court stated thus:

> " Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the argument of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution."

13. With the foregoing as well as Article 258 of the Constitution in mind, I do not believe that the Petitioner herein is a busy body simply filled with mala fides and undeserving to litigate as he is now doing. The Petitioner in my view has the requisite standing to bring forth an action and demonstrate a violation or threatened violation of the Constitution.

Formal competence

14. Ms. Mutua additionally contended that the Petition lacks the requisite precision and consequently there was no discernable cause of action. In response and referring to the United States of America Case of Hennes –v- Kerner 404 U.S 519 (1972), the Petitioner stated that the pleadings must be considered with the thought of the Petitioner as a lay litigant in the back of one's' mind

15. I have read the Petition, not once but severally. There is certainly no doubt that it is wanting in form. No attempt was made at all to ensure compliance with Rule 10(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules, 2013 (" the Mutunga Rules "). The constitutional provisions violated or threatened with violation have not been disclosed. The nature of injury to be suffered is also not disclosed. Who has violated or threatened to violate the Constitution has been indicated, albeit in rather unclear terms as the Attorney General and the National Intelligence Service. Yet the two are not parties to the Petition.

16. It is true that the rules appreciate and seek to accommodate the epistolary approach, especially by lay persons, to the filing of Petitions under Rules 10(3) & 10(4) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice & Procedure Rules 2013. It is also true that it is expected of parties who opt to formally approach the court to be precise in the pleadings. The precision need only be reasonable. The Constitutional provisions violated or under threat of violation need be stated with sufficient clarity. The manner of violation or the threat to violate also need be sufficiently stated: see Anarita Karimi Njeru –v- Republic [1976-80] 1 KLR 1252 and also Mumo Matemu –v- Trusted Society of Human Rights Alliance & Others (Supra). The precision however need not be absolute and the principle laid down in Anarita Karimi Njeru –v- Republic (Supra) is to be applied sparingly if the Petitioner's claim can be easily discerned from the filed Petition. Indeed, each case ought to be individually viewed and where the court is able to painlessly identify the constitutional

question(s) raised, then the Petition ought to be sustained and determined on its merits rather than be struck out. See the cases of Masai Mara (Sopa) Ltd –v- Narok County Government HCCP 336 of 2015 [2016] e KLR where this court stated as follows:

[43]...The principle of law as to precise pleadings must however not be applied to lock out parties with genuine disputes and claims. The principle ought not be applied line,hook and sinker: see Samuel Gunja Sode & Another –v- The County Assembly of Marsabit & 2 Others [2016] eKLR as well as the Court of Appeal in Peter M. Kariuki –v- Attorney General [2014]eKLR

[44]In Nation Media Group Ltd –v- Attorney General [2007] 1 EA 261 the court observed as follows:

> " A Constitutional court should be liberal in the manner it goes round dispensing justice. It should look at the substance rather than technicality. It should not be seen to slavishly follow technicalities as to impede the cause of justice...As long as a party is aware of the case he is to meet and no prejudice is to be caused to him by failure to cite appropriate sections of the law under pinning the application, the application ought to proceed to substantive hearing..."(emphasis in original)

17. With the forgoing in mind, I must confess that I agonized reading through the Petition. While the final prayers sought were relatively clear, the Petition was riddled with coincidences, speculations, imaginations, myths, philosophical statements and contradictory admissions. Not a singular Article of the Constitution was cited and alleged to be violated or threatened with violation. Indeed, the cited Article 167(1) which relates closely to the subject matter (retirement of the Chief Justice) is a stark admission that the 1st Respondent may exercise his valid option to retire prior to reaching 70 years of age. Such an admission contradicts the prayers sought.

18. The Petition, in my view has unfortunately not met the threshold of competence anticipated of petitions. It is virtually impossible to discern what the Petitioner's constitutional issue truly is. The reliefs sought may be clear but it must be noted that reliefs are never substantively the constitutional issues(s). The Petition does not pass the formal competency test.

Retirement of the Chief Justice

19. Assuming I have erred and that a constitutional issue or question may be identified, I can only do so by reference to the reliefs sought. In the reliefs, the Petitioner makes it clear that the 1st Respondent ought to be restrained from retiring on 16th June 2016. Can the court do so? Can the court grant such relief or orders?

20. I am unable to identify how such orders can be granted in view of the clear provisions of Article 167(1) & (2) of the Constitution. The Article stipulates as follows:

> " 167 (1) A judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years.
>
> (2) The Chief Justice shall hold office for a maximum of ten years or until retiring under clause (1), whichever is earlier".

21. In the face of the clear provisions of Article 167(1), there was no controversy that the 1st Respondent was perfectly entitled to retire prior to reaching the age of 70. That was and is his Constitutional right. Critically a denial of this right by the court or otherwise by the 2nd Respondent would lead to a direct unnecessary conflict with Article 41(1) as to fair labour practices and, possibly, Article 30 as to servitude and forced labour. It would not assist in promoting constitutional values and principles if this court

was to force the 1st Respondent to continue in office after he has voluntarily opted to vacate the same office earlier but as allowed by the Constitution and his terms of employment. After the age of 65, the Chief Justice could at anytime thereafter, like all other judges of the superior courts, retire upon notice as appropriate. The 1st Respondent exercised that right to retire and I see no reason absolutely why the court should interfere with the same.

22. For all the above reasons, I would dismiss the Petition but make no order as to costs. The Petition is dismissed and each party shall bear its own costs.

Dated, Delivered and Signed at Nairobi this 16th day of June 2016

J.L. ONGUTO

JUDGE