



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**MISC CIVIL APPLICATION NUMBER 479 OF 2014**

**IN THE MATTER OF THE ARBITRATION ACT CHAPTER 49 OF THE LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE ARBITRATION RULES, 1997**

**BETWEEN**

**EVANGELICAL MISSION FOR AFRICA.....1<sup>ST</sup> CLAIMANT**

**CINDY SANYU OKOVA.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**KIMANI GACHUHI.....1<sup>ST</sup> RESPONDENT**

**PETER MBUTHIA GACHUHI.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. The main application brought by the Claimants herein is a chamber summons dated 6<sup>th</sup> October, 2014. It seeks under paragraph 8, to set aside the final Arbitration Award made on 19<sup>th</sup> August, 2014, by Arbitrators Steven Gatembu Kairu and Joe W. Okwach. The grounds include that the Award was procured through fraud, bribery, corruption, abuse of office, dishonesty and flagrant breach of law. The participation of Steven Gatembu Kairu, who is alleged to have been appointed a Judge of the Court of Appeal at the time, is also impugned. The application is supported by the affidavit of Hwa Ok Im, the Claimant's Director.
2. When the matter came up on 15<sup>th</sup> October, 2014, Prayer No 2 of the application was the only point on which the parties' counsel, Ahmednasir Abdullahi SC for the Claimants, and Kamau Karori for the Respondents, were ready to argue. That prayer, which is the subject of this Ruling, seeks the following order:

***“THAT due to the importance and gravity of the matters herein the Honourable Court be pleased to place this matter before the Principal Judge of the High Court with a view to constitute a panel of odd number of judges to hear this application.”***

3. The application is opposed.

## THE SUBMISSIONS

4. Mr. Ahmednasir Abdullahi, submitted that the Principal Judge of the High Court has powers in his administrative capacity to empanel a bench when parties make such an application. He urged that the matter placed before the court is grave from a legal and societal point of view, as it is a contest between right and wrong; the poor and the rich; and the elites; that the matter involves an arbitrator subsequently appointed a judge of appeal and whether he should have immediately recused himself and laid down his tools; that the profound issue arising is whether a Judge can undertake other work which does not entail discharge of his judicial function; and that there are serious ramifications for both the arbitral process and for the judge especially where issues of impropriety have been raised, that may be of interest to the Judicial Service Commission.
5. Counsel also argued that the right to a fair hearing enshrined in **Article 50** of the **Constitution** is a peremptory norm from which there can be no derogation since under **Article 25(c)** of the **Constitution** there is no limitation to the right to fair trial. The claimants' argument is that they may not get a fair hearing given that one of the contested issues concerns a judge of appeal; and they would seek to demonstrate, by empirical analysis, a certain jurisprudential thread that shows an element of brotherhood on the bench. Thus on account of the weight and gravity of the matters raised, Senior Counsel submitted that an uneven bench of three or five judges should be appointed.
6. Counsel pointed out that though under **Article 159** of the **Constitution**, arbitration is a mechanism that needs to be encouraged, there can be no support for an arbitration process that is a butchery of justice, or where the arbitrators exercise judicial impunity. As such, this case raises serious questions of profound public interest; that arbitration should be open and susceptible to judicial scrutiny so as to bring accountability to the process; and that empaneling a three or a five judge bench would result in jurisprudence that would enrich the arbitration process.
7. It was submitted by Counsel that from tradition, custom and usage, when a matter is heavy a two judge bench may be appointed. On this, Counsel relied on the cases of **Kenya Pipeline Company Limited vs. Kenya oil Company Limited & Another, H.C.C.Civil Appeal No. 13 of 2010** (Unreported) and **Equity Bank Limited vs. West Link Mbo Limited [2013] e KLR**. In conclusion, Mr. Abdullahi submitted that there will be no prejudice on the Respondents if an expanded bench is constituted.
8. In opposition, Mr. Karori, limited his response to prayer 2 of the application. He submitted that jurisdiction is everything, and referred to the oft cited dictum of Nyarangi J.A in **The Owners of Motor Vessel Lillian 'S' vs. Caltex Oil (Kenya) Ltd [1989] KLR 1**. He noted that jurisdiction is vested in the court either under the Constitution or statute, and pointed out that neither statute nor law had been cited by the Claimants in support of their application.
9. Counsel submitted that as regards hearing of matters at the High Court, the usual procedure and practice is that one judge should hear any matter filed in court unless otherwise provided by law. Counsel cited **Article 165 (2)** of the **Constitution** as providing for the election of the Principal Judge. Under that provision, the Principal Judge is not vested with any judicial function above those of any other judge seized of a matter in court.
10. Mr. Karori submitted that the **Constitution** under **Article 165(4)**, recognizes certain circumstances when the Chief Justice can empanel a bench of three or more judges pursuant to a certificate of a Judge. Counsel highlighted the fact that, clearly, the claimants are not moving the court under that constitutional provision. Thus, it was Mr. Karori's submission that other than the Chief Justice, no other Judge can constitute such bench.
11. It was submitted that this was the case in **Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR**, where the 2<sup>nd</sup> Interested Party, **Hewlet-Packard Europe BV, Amsterdam Myerin Branch** made an application for a certificate under **Article 165(4)**. Such certificate was then issued prompting the Chief Justice to appoint a bench. It was also submitted that the jurisdiction to empanel a bench is limited to matters of grave importance as envisaged under the aforesaid provision. Counsel also relied on the cases of **Republic v Public Procurement Administrative Review Board & 3 others Ex-Parte Olive Telecommunication PVT Limited [2014] eKLR** and **Royal media Services Ltd & 2 others v Attorney General & 6 others [2013] e KLR**.
12. As far as gravity of cases is concerned, Counsel pointed out that numerous arbitration awards are regularly challenged in respect of large and grave subject matter presided over by a single judge.

- On this, he relied on the case **National Oil Corporation of Kenya Limited vs. Prisko Petroleum Network Limited [2014] e KLR** where an application to set aside an arbitral award of Kshs. 1.2 Billion involving grave questions of law and constitutional issues was heard by a single judge.
13. On the right to a fair hearing, it was submitted that it is a fundamental right and can be heard under **Article 165(3) (b) and (d)** of the **Constitution**. However, the same does not need the constitution of a bench, unless a party applies for a certificate under **Article 165(4)**.
  14. On the issue of a court of appeal judge arbitrating on the matter, Mr. Karori submitted that the judge had heard the matter to its conclusion as an arbitrator, before his appointment as a judge. After his appointment, the parties pleaded with the arbitrator to conclude the writing of the decision, and it was in the public interest and public policy of Kenya that he should conclude the writing of the award. Counsel also submitted that the Chief Justice permitted the judge to proceed to write the award.
  15. In his rejoinder, Senior Counsel Ahmednasir argued that no question of jurisdiction arose. All that was sought was the exercise by the Principal Judge of a ministerial administrative power to empanel a bench. This could be done by the Principal Judge as head of the High Court, in exercise of his administrative discretion.
  16. I have considered the oral submissions together with the authorities cited and filed later and opine as hereunder.

## THE ISSUE

17. The issue that this court will deal with at this point is;

*Whether the Principal Judge of the High Court has power to empanel a bench to hear a matter in the High Court.*

## ANALYSIS

18. The argument made by Senior Counsel Ahmednasir that the Principal Judge is vested with administrative powers to empanel a bench to sit over matters of grave importance is novel and sounds plausible. It is necessary, however, to examine that argument in light of the existing legal provisions and practice, and the powers of the Principal Judge.
19. The office of Principal Judge is created through an election by Judges of the High Court amongst themselves pursuant to **Article 165(2)** of the **Constitution**. Other than creating the office, that provision is silent on the powers of the said office.
20. **Section 2** of the **Judicial Service Act (Cap 185B)**, (hereafter **the JSA**) defines Principal Judge as the head of the High Court and the courts of equal status in the following terms:

***“principal judge’ means the head of a superior court, other than the Supreme Court and the Court of Appeal”***

21. The **JSA** also makes provision for the powers of the Principal Judge. **Section 6(2)** provides as follows:

***“(6) The President of the Court of Appeal and the Principal Judge shall, in consultation with the Chief Registrar, be responsible to the Chief Justice for the administration of the Court of Appeal or other superior courts respectively, other than the Supreme Court.”***  
(emphasis added)

22. That provision gives the Principal Judge, in consultation with the Chief Registrar, administrative oversight over the High Court and courts of equal status and provides that he is responsible to the Chief Justice. This is to be expected because under **Section 5 JSA**, the Chief Justice is the head of the Judiciary, and under **Section 5(2) (a) and (c)** the Chief Justice is entitled to:

***“(a) assign duties to the ...Principal Judge of the High Court and Chief Registrar of***

*the Judiciary....”* and to

***(c) exercise general direction and control over the Judiciary”***

Thus, if the Chief Justice assigns or delegates any responsibility to the Principal Judge, he would be well within his powers to carry it out.

23. The provision giving the Chief Justice power to empanel a bench under **Article 165(4)** of the **Constitution**, is in the following terms:

***“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.”***

24. In the case of **Kenya Medical Research Institute vs. Attorney General & 3 others [2014] e KLR**, it was held that:

***“Article 165(4) of the Constitution stipulates circumstances under which the Chief Justice can exercise his powers under that Article. It is a requirement that the substantial question of law which justifies the invocation of the said provision must either be where the Court is required to make a determination of the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or a determination in respect of a question respecting the interpretation of the Constitution. It is therefore clear that Article 165(4) can only be invoked in specific and limited circumstances. This is therefore, in our view, not an ordinary jurisdiction.”***

25. From the above it is clear that the empanelment of a bench under **Article 165(4)** arises when circumstances are special and the jurisdiction to be exercised is not ordinary. Further, while citing with approval the case of **Samson Matende vs. Republic, Malindi High Court Criminal Appeal No. 141 of 2009**, the High Court in **Kenya Medical Research Institute** (*supra*) observed that:

***“Article 259 of the Constitution provides that a function or power conferred by the Constitution on an office may be performed or exercised as occasion requires by a person holding such an office. Article 165(4) mandates the Chief Justice to assign Judges to hear a matter falling thereunder...[he is]...bound under Article 259 of the Constitution to do so in a manner that promotes its purpose, values and principles and advances the Rule of law, human rights and fundamental freedoms in the Bill of Rights. To interpret the Constitution in a manner that limits or constrains the powers granted to the Chief Justice under Article 165(4) would not in our view advance these principles.”***

26. As such, the empanelment of a bench must also take into account such considerations as justify the use of additional administrative and judicial resources, personnel and time in promoting expedition and the fair administration of justice in line with the constitutional principles.

27. I have been able to identify other legal provisions empowering the Chief Justice in respect of empanelling a bench. These include the following:

28. Power under **Section 79C** of the **Civil Procedure Act** enabling the Chief Justice to direct that appeals to be heard by two or more judges. The said provision reads as follows:

***“Appeals from subordinate courts shall be heard by one judge of the High Court except when in any particular case the Chief Justice shall direct that the appeal be heard by two or more judges of the High Court; and such direction may be given before the hearing of the appeal or at any time before judgment is delivered.”***

29. Further, as regards criminal matters, **Section 359(1)** of the **Criminal Procedure Act, Cap 375** provides that:

**“Appeals from subordinate courts shall be heard by the judges of the High Court, except when in any particular case the Chief Justice, or a judge to whom the Chief Justice has given authority in writing, directs that the appeal be heard by one judge of the High Court.”** (emphasis added).

30. The principles that emerge from the foregoing consideration of the law are as follows: that the Chief Justice is entitled to empanel benches of the High Court in different circumstances; that he is also, as head of the Judiciary, empowered to assign duties to the Principal Judge; that there is no expressed limitation to his said discretion; and that the exercise of such power is a special jurisdiction, not to be exercised except in specified circumstances.
31. Jurisdiction is paramount in the lawful exercise of a court’s function. It dictates whether a further step can be made or not. On the question of whether a court would be properly seised with jurisdiction, the Supreme Court in **Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others [2012]** observed thus;

***“(68) 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. ....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.”*** (emphasis added).

32. The claimant cited the case of **Kenya Pipeline Company Limited** (*supra*) where a two judge bench was constituted to hear an appeal against an arbitral award. I have perused the record and I find that, on 15 June, 2011, the parties entered into a consent to have the hearing of the appeal before a two judge bench. Unlike the situation in the present case, the matter was thereafter forwarded to the Chief Justice who constituted a bench pursuant to **section 79C** of the **Civil Procedure Act**. This was in accordance with the legal provisions.
33. In conclusion, the Chief Justice, not the Principal Judge, is empowered under the Constitution and statute to empanel a bench in the High Court. He is also empowered to assign functions to the Principal Judge. None of those powers have been donated either by law or by assignment, delegation or otherwise to the Principal Judge. The Principal Judge can therefore only exercise powers lawfully conferred on him by the Constitution or statute or assigned by the Chief Justice. Accordingly, when the Principal Judge sits in court, he sits in his capacity as a Judge of the High Court exercising jurisdiction conferred upon him under **Article 165** of the **Constitution**, and any administrative powers or responsibilities assigned to him by the Chief Justice under the **Judicial Service Act**.
34. In the circumstances therefore, prayer 2 of the Claimant’s application dated 6<sup>th</sup> October, 2014 hereby fails, with costs to the Respondents.
35. This file shall be returned to the Presiding Judge, Commercial Division, for further orders as to the hearing thereof.
36. Orders accordingly.

Dated at Nairobi this **18<sup>th</sup>** day of **November**, 2014

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**RICHARD MWONGO**

**PRINCIPAL JUDGE**

**Read in open court**

Coram: Simiyu: Court Clerk.

**In Presence of Parties/Representatives as follows:**

- a) .....  
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- b) .....