



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL SUIT NO 1527 OF 2004(OS)

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS & FREEDOMS

BETWEEN

ATHANAS NZUKIPLAINTIFF

VERSUS

UCHUMI SUPERMARKET LTD FIRST DEFENDANT

ATTORNEY GENERAL SECOND DEFENDANT

JUDGMENT

Introduction

1. In his application by way of Originating Summons dated the 8th of November 2004, the applicant seeks orders against the decision of Ransley J(as he then was) in High Court Civil Case No 1554 of 2001. He contends that his fundamental rights under section 77(9) of the former constitution to a fair and impartial hearing in the said suit was breached by the court. The alleged breach arose as a result of the failure by the court to consider whether or not the terms and conditions regulating his employment with the defendant in that suit breached the applicant's rights not to be subjected to inhuman, degrading or other treatment by being dismissed from employment after almost 20 years of continuous and blameless employment service.
2. The application is opposed. The respondent filed grounds of opposition and submissions. The gist of the opposition to the application is that this court has no jurisdiction to entertain this application, as to do so would be to sit on appeal on the decision of a court of competent and concurrent jurisdiction.
3. It is not clear from the record exactly why the matter took so long-over 8 years- to proceed to hearing, but it eventually proceeded before me on 5th December 2012.

The Case for the Applicant

4. The applicant's case was presented by Mr. Kouna and is set out in his affidavit in support of the application and the written submissions dated 13th November 2006. The applicant argues that he is entitled to bring this suit before the court without prejudice to any other matter filed provided it raises an issue of breach of his fundamental rights. Mr. Kouna relied on the decision of the Court of Appeal in **Rashid Odhiambo Allogoh & 25 Others -v- Haco Industries Limited, Civil Application No 110 of 2001** in this regard.

5. He argues that the court should consider the complaints made on the breaches against the applicant in relation to a contract of employment that denied him his fundamental rights in breach of Section 70, 71, 75 and 77 of the former constitution.
6. On the argument by the respondents that the applicant had an alternative avenue to raise the issue that he now raises against the decision of Ransley, J, the applicant takes the view that this does not stop him from bringing this claim, and this court has supervisory jurisdiction where any judicial forum, including another High Court, has breached fundamental rights of a party. Mr. Kouna therefore asked the court to grant the application and the orders sought.

The Case for the 1st Respondent

7. The 1st respondent relied on the grounds of opposition filed on 20th April, 2005, the affidavits filed in opposition to the application sworn by Ms. Pauline Kiraithe on 20th April and 17th August 2005 and the written submissions filed on 20th August 2006.
8. The 1st respondent contends that it cannot properly be argued that termination of the applicant's employment was a breach of fundamental rights. The applicant had previously been employed by the 1st respondent, had terminated his employment, and had asserted his right to do so in his evidence in the case before Justice Ransley. He could therefore not be heard to argue that the same right to terminate his employment that he had asserted did not lie in the 1st respondent as the constitution gives both rights and obligations to all parties.
9. The 1st respondent contended that what the applicant was asking this court to do was to sit on appeal on the decision of another court, and Mr. Fraser referred the court to the decision of the Court of Appeal in **Kombo v- Attorney General [1995-1998]IEA 168** for the submission that the court had no jurisdiction to do this.
10. Finally, it was the 1st respondent's contention that the applicant, having taken a benefit from the judgment that he now impugns by accepting the decretal sum and costs awarded cannot now ask that the judgment be set aside. Mr. Fraser asked the court to dismiss the application with costs.

The 2nd Respondent's Case

11. Ms. Makori for the 2nd respondent relied on the grounds of opposition filed on behalf of the the Attorney General dated 19th September 2005 and associated herself with the submissions of Mr. Fraser, Counsel for the 1st respondent. She submitted that the issue that the applicant was aggrieved by was heard and determined by Justice Ransley in High Court Civil Case No. 1554 of 2001.
12. She argued that the applicant was aggrieved by the decision in that matter, specifically the damages awarded, but instead of filing an appeal, he filed this reference. Ms. Makori submitted that there are no constitutional issues raised in this application and she urged the court to dismiss it with costs.

Issue for Determination

13. The applicant asks this court to issue various orders in relation to the decision made by Ransley J in HCCC No. 1554 of 2001. The prayers he makes in his Originating Summons, essentially ask this court to find that the High Court (Ransley J) violated his right to a hearing and failed to make findings and issue orders that it should have done.
14. In my view, this application stands or falls on the determination of one simple issue: whether this court has jurisdiction to supervise a court of concurrent jurisdiction where it is alleged that there

has been a breach of fundamental rights.

15. The facts relevant for determination of the issue before me that emerge from the pleadings disclose that the applicant was fully heard by Ransley, J in HCCC No. 1554 of 2001. An award was made in his favour, and he took benefit of this award. It has been deponed by the 1st respondent, and this has not been denied by the applicant, that he was paid the damages and costs that he was awarded in HCCC No 1554 of 2001 and that the case was marked as settled. A consent letter marking the case as settled was filed on 10th May 2005.

16. It appears, however, that he was not satisfied with the award made in his favour in that case. The grounds on which he brings this application as set out in the application are that:

1. ***In determining the issues raised in the plaint, the honourable high court is obliged under the provisions of the judicature /act to interpret any statute or law in conformity with the constitution.***
2. ***Where any law is inconsistent with the constitution or where its effect breached any of the fundamental rights guaranteed under chapter V of the constitution as did the terms and conditions applied to dismiss the plaintiff the court is obliged to hold such law or the effects of the application of such law to the plaintiff to have been inconsistent with the constitution and refuse to give them effect.***
3. ***The terms and conditions of service applicable to the plaintiff were drawn in accordance with the employment Act which said Act in purporting to deny the plaintiff his fundamental rights is inconsistent with the constitution and hence null and void to the extent of the inconsistency.***
4. ***It is reasonable and just that the plaintiff do raise the issues herein notwithstanding the fact that they were not raised in the proceedings the subject of this reference.***
5. ***A more effective remedy is required in addition to the award made on the basis of the plaintiff's terms and conditions of employment***
6. ***An award under section 84 of the constitution is a more effective remedy for a person such as the plaintiff who had served so long with his employer and had only seven years to go before reaching the statutory retirement age of 55***
7. ***There is no prejudice occasioned to the defendants by a further redress under section 84 of the constitution.***

17. Reduced to its bare bones, the plea by the applicant is that this court should supervise another judge of the High Court; that it should, in effect, sit on appeal on the decision of a court of concurrent jurisdiction and grant orders and remedies that the said court failed to grant. Such a plea arises, I believe, from the misapprehension that many Counsel and litigants continue to harbour about the powers and jurisdiction of the Constitutional and Human Rights Division of the High Court. I can do no better, in answering the applicant's plea, than to reiterate the findings of the Court of Appeal and of this Court in dealing with matters such as the one currently before me.

18. In **Peter Nganga Muiruri-v-Credit Bank Limited & Another Court of Appeal Civil Appeal No. 203 of 2006**, the Court of Appeal, in dealing with an appeal arising from a decision of Nyamu, J (as he then was) stated as follows:

We want to set the law straight on the jurisdiction of what the learned Judge called "the Constitutional Court".

The part of the Constitution which deals with the establishment and jurisdiction of courts in Kenya is headed "The Judicature". Section 60 of the Constitution

establishes the High Court with “unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.” Although the Constitution stipulates that the jurisdiction of the High Court in criminal and civil matters is unlimited it is circumscribed by rules of practice and procedure to enable the court to function side by side with courts and tribunals subordinate to it and to guide it in the manner of exercising its jurisdiction and powers.

Section 64 of the Constitution establishes the Court of Appeal with such “... jurisdiction and powers in relations to appeals from the High Court as may be conferred on it by law”. On the basis of this provision the Court of Appeal cannot directly entertain an appeal from any other court other than the High Court.

Sections 65 and 66 of the Constitution establish courts subordinate to the High Court which are Magistrates Courts and Kadhi Courts, and also Courts Martial. Each of those courts exercises such jurisdiction and powers as “may be conferred on it by law.”

There is no provision in the Constitution which establishes what Nyamu J. referred to as 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.

With regard to protective provisions Section 84 of the Constitution does not in any of its sub-sections talk about the Constitutional Court. Instead it talks about an application being made to the High Court.

In view of what we have stated above, it is quite clear that Nyamu J.’s remarks which we earlier reproduced were based on the mistaken belief that the Constitution had created a court called the Constitutional Court with supervisory powers over all other courts. 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.

Any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. 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. As the late Nyarangi JA once remarked in the case of The Owners of the Motor Vessel “Lilians” vs Caltex Oil Kenya Ltd [1989]KLR I “Jurisdiction is everything. Without it, a court has no power to make one more step”.

19. In *Philip Kipchirchir Moi -v- Attorney General & Another* Petition No. 65 of 2012, Justice Lenaola observed at paragraph 15 of his judgment as follows: :

‘.....I must begin by dispelling the fallacy that the Constitutional and Human Rights

Division of the High Court in Nairobi has jurisdiction to superintend, supervise, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived, of other Divisions of the High Court in Nairobi or elsewhere in Kenya. In spite of the continued and consistent stand of judges of that Division that it cannot have been the intention of the framers of the Constitution that such a position should exist, parties in every conceivable case, continue to invoke that fallacious

and misguided jurisdiction. (Emphasis Mine)

20. After citing the statement of Lenaola, J, set out above, I observed as follows at paragraph 29 and 30 of my ruling in **Robert Mwangi –v-Shepherd Catering Limited & Others Petition No. 84 of 2012:**

29. This message must be brought home to litigants, and the duty to do this lies with their legal counsel. 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.

*30. 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. As Justice Nyarangi so succinctly put it in *The Owners of the Motor Vessel “Lilians” vs Caltex Oil Kenya Ltd [1989] KLR I**

“Jurisdiction is everything. Without it, a court has no power to make one more step”.

21. There is no basis for the application before me now, nor was there such basis when it was filed 8 years ago. The constitution then in force did not, and the Constitution now in force does not, permit a judge of the High Court to supervise another judge of the High Court, or to sit on appeal on his or her judgment.

22. This application is therefore dismissed with costs to the respondents.

Signed at Nairobi this 18th day of January, 2013.

MUMBI NGUGI

JUDGE

Dated and Delivered at Nairobi on 18th January, 2013

D. S. MAJANJA

JUDGE

Mr. Kouna instructed by the firm of Gitobu Imanyara & Co. Advocates for the Applicant.

Mr. Fraser instructed by the firm of Hamilton Harrison & Mathews Advocates for the 1st Respondent

Ms Makori instructed by the State Law Office, for the 2nd Respondent