



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NUMBER 400 OF 2011**

**CFC STANBIC BANK LIMITED..... PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**JOHN MAINA GITHAIGA**

**PAUL KIBUNYI MUTIRO**

**T/A ORIENT TRANSJOPA SAFARIS.....1<sup>ST</sup> INTERESTED PARTY**

**CENTRAL BANK OF KENYA.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

**Introduction**

1. On 12<sup>th</sup> July 2012, the petitioner, a limited liability company which was the defendant in this suit, filed its petition dated 12<sup>th</sup> July 2012 in which it alleges that Rule 47 of the Court of Appeal Rules 2010 as applied in Rule 5(2)(b) of the same Rules does not meet the constitutional requirements of Article 27 of the Constitution.

2. The petitioner therefore sought the following orders from the court:

a) *A declaration do issue that in so far as Rule 47 of the Court of Appeal Rules does not empower a single Judge who certifies a matter urgent to be addressed on and where appropriate grant interim relief is a breach of Articles 27 and 50 of the Constitution.*

b) *An order do issue to the Rules Committee to amend Rule 47 of the Court of Appeal Rules to allow for parties to canvass for interim protection prior to determination of urgent matters in the Court of Appeal.*

c) *The Honourable Court do issue such orders and give such directions as it may deem fit to meet the ends of justice.*

d) *The costs of the Petition be awarded to the Petitioner.*

2. The parties to this petition appear to have had a long and acrimonious history. However, the facts relevant to this determination are that the 1<sup>st</sup> Interested Parties had filed a civil claim against the petitioner and a default judgment was entered in their favour against the petitioner. The petitioner then filed an application to set aside the default judgment, which application was dismissed. An application for

stay of execution of the judgment was also dismissed by the High Court.

3. The petitioner then filed Court of Appeal Civil Application No. 117 of 2012 under Rule 47 of the Court of Appeal Rules seeking to stay the execution of the decree arising from the default judgment entered against them in HCCC 400 of 2011. The application was filed on 30<sup>th</sup> April, 2012 and was certified urgent and fixed for hearing on the 12<sup>th</sup> of July, 2012, but soon thereafter was taken out of the list for that date and fixed for hearing on 19<sup>th</sup> July 2012.

4. The petitioner therefore filed this petition arguing that it was left with no protection and there was likely to be a violation of its rights under Article 40 if execution issued in the matter as there would be no prospect of recovering the decretal sum if its appeal succeeded. Conservatory orders were issued in the matter pending the hearing of the petition.

5. When the matter came up for hearing before me on 14<sup>th</sup> December 2012, Mr. Ogunde, Counsel for the petitioner, informed the court that the application for stay of execution that had been pending before the Court of Appeal had been heard and determined in the petitioner's favour. Mr. Ogunde nonetheless submitted that it was worthwhile for me to determine the petition as Rule 47 was still in force. Counsel for the Interested Parties, Mr. Nduati Charagu and Mr. Owino agreed and urged me to determine the petition as the issue was of interest even though there was no longer a live issue between the parties on the matter.

6. The question that I am confronted with is whether, given the fact that the issue that first prompted the petitioner to file this petition has been resolved by the decision of the Court of Appeal, there is still a justiciable matter before me. Put differently, should this court proceed to determine the issue of the constitutionality or otherwise of Rule 47 of the Court of Appeal Rules given that the prayers sought in the petition are now moot and there is no longer any controversy or dispute between the parties to the petition?

7. I take the view that once there is no longer a dispute or controversy between parties, there is no longer a justiciable issue for the court to determine. The word 'justiciable' is defined in Black's Law Dictionary, 9<sup>th</sup> Edition as a matter that is "*properly brought before a court of justice*" while a '**justiciable controversy**' is defined as "*a controversy capable of being disposed of judicially.*" In the case of *African International Centre for Policy and Conflict & 5 Others -v- The Hon. Attorney General & 4 Others Petition No 552 of 2012* the court defined 'justiciable' to mean "*proper to be examined in courts of justice*" and a '**justiciable controversy**' is defined as "*a controversy in which a claim or right is asserted against one who has an interest in contesting it.*"

8. In the present petition, none of the parties have an interest in pursuing the petition. Any interest that a determination of the petition may have in so far as they are concerned is an academic interest, in that it may be useful in the future as the impugned Rule 47 is still in force.

9. In my view, this court has no jurisdiction to deal with hypothetical and abstract issues unconnected with a dispute between parties. As was held in **John Harun Mwau & 3 Others -v- Attorney General and 2 Others, Petition No. 65 of 2011**, the jurisdiction of the High Court in interpreting the Constitution is not to be exercised in the absence of a real dispute:

**'We also agree with the submissions of Prof. Ghai that this Court should not deal with hypothetical and academic issues. In our view, it is correct to state that the jurisdiction to interpret the Constitution conferred under Article 165(3)(d) does not exist in a vacuum and it is not exercised independently in the absence of a real dispute. It is exercised in the context of a dispute or controversy.'**

10. In the case of **Stephen Mbugua Mwagiru and Another vs. Tatu City Limited Civil Application No. 206 of 2011** the court observed as follows:

***"Was it necessary for this Court to sit for two [2] hours and hear an application which was at the end of the day an academic exercise? We felt that in the light of the provisions of Sections 3A and 3B of the Appellate Jurisdiction Act, counsel had a duty to assist the Court in ensuring and facilitating the expeditious and efficient disposal of the application instead of engaging in a moot exercise which was not going to add any value to the proceedings before the High Court. We say so because as at the time we heard these applications, Oraro & Company Advocates were no longer on record for the parties in the matter before the High Court. The matter was also proceeding with full participation of all the parties. Had this information been brought to our attention before we started hearing these applications, the Court would definitely have been spared considerable time and other resources which could have been applied to dealing with other matters."(Emphasis mine)***

11. Counsel for the parties in this matter did inform the court in good time that there was no longer a controversy in issue between the parties to this petition. In such circumstances, any determination of the issues that the petition raises would at worst be for academic purposes only and a waste of limited judicial time, and at best, an advisory opinion which this court has no jurisdiction to give.

12. While the issues raised in the petition are not idle and will merit determination at some point, this is not the forum for their determination. Indeed, given that the petitioner was seeking orders directed at the Rules Committee to amend Rule 47 of the Court of Appeal Rules to allow parties to canvass for interim protection before hearing of urgent matters, I believe that representations can still be made to that Committee to consider the matter and make amendments should they consider such amendments justified.

13. In any event, this petition is struck out with no order as to costs.

**Dated, Delivered and Signed at Nairobi this 14<sup>th</sup> day of March, 2013**

**Mumbi Ngugi  
Judge**

**Mr. Ogunde instructed by the firm of Walker Kontos & Co. Advocates for the Petitioner**

**Mr. Nduati Charagu instructed by the firm of Nduati Charagu & Co. Advocates for the 1<sup>st</sup> Interested Party**

**Mr Owino instructed by the firm of Murgor & Murgor & Co. Advocates for the 2<sup>nd</sup> Interested Party.**