



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 1173 OF 2007

BETWEEN

AZIM TAIBJEE AND MANDHAV BHALLA BOTH T/A

TAIBJEE & BHALLA ADVOCATES 1ST PLAINTIFF

AZIM TAIBJEE 2ND PLAINTIFF

MADHAV BHALLA 3RD PLAINTIFF

AND

THE ATTORNEY GENERAL RESPONDENT

AND

KENYA COMMERCIAL

BANK LTD 1ST INTERESTED PARTY

CHARTERHOUSE BANK LTD 2ND INTERESTED PARTY

CENTRAL BANK OF KENYA 3RD INTERESTED PARTY

JUDGMENT

Introduction

1. This judgment deals with the important issue of the jurisdiction of the High Court to determine matters concerning the enforcement of fundamental rights and freedoms and whether the court, in exercising this jurisdiction, can set aside an order of a High Court Judge given in a separate suit.
2. The order which is challenged by the petitioners arises from a civil suit; *Milimani High Court Civil Case No. 626 of 2006 (OS)* between *Kenya Commercial Bank Limited and Charterhouse*

Bank Ltd (“the civil suit”).

The facts

3. The facts giving rise to this case are not in dispute. The petitioners, a firm of advocates, (“the firm”) acted for Charterhouse Bank which was placed under statutory management on 21st March 2006 by Central Bank of Kenya. Prior to this, the firm received instructions from Charterhouse Bank to prepare security documents for their customers, Compack Limited and East Africa Foundry Works, to secure credit facilities in excess of Kshs.100,000,000/=. As part of the negotiations, Charterhouse Bank undertook to settle liabilities owed by Compack Limited to Kenya Commercial Bank.
4. The firm also received security documents from Charterhouse Bank without giving an undertaking to Kenya Commercial Bank or its advocates and embarked on the task of preparing the security documentation. In the course of completing the transaction, Charterhouse Bank was placed under statutory management. That decision was the subject of legal contestation in several cases which are not relevant to these proceedings. During this time, the firm decided to hold the security documents as a lien to secure fees due to them.
5. In the meantime Kenya Commercial Bank sued Charterhouse Bank in the civil suit and in the course of proceedings the suit was compromised on 4th September 2007 before Warsame J., on the following terms;
 1. ***That this application be and is hereby certified as urgent and heard during the High Court vacation.***
 2. ***That this suit be and is hereby marked as wholly adjusted or settled in terms of the agreement or compromise reached and evidenced by the correspondence exchanged between the parties between 24th May 2007 and 18th July 2007.***
 3. ***That judgment be and is hereby entered for the applicant in terms of the said Agreement or compromise as follows;***
 - a. ***The respondent’s advocates or agents Messrs Taibjee and Bhalla Advocates do within four days of service of this Order release all the applicant’s security document set out in Schedule of Deeds dated 13th June 2006 to the Applicant’s Advocates Messrs Walker Kontos upon the terms of the undertaking given by the respondent to the Applicant in a letter dated 2nd June 2006.***
 - b. ***That in the event that the security documents are not released within four days of the service of this order, the court do issue an order for enforcement of the undertaking against the firm of Messrs Taibjee and Bhalla Advocates that the said firm refused to comply with the court order.***
 - c. ***That each party bears its own costs and in the event the security documents are not released by the firms of Messrs Taibjee and Bhalla Advocates within four days of service of the order, the firms be personally held liable to pay the costs of the originating summons and the application.***
 4. ***That Taibjee and Bhalla Advocates do release the documents within the next 7 days.***
6. The circumstances under which the consent was recorded is what has aggrieved the petitioners. They state that the application on which the consent order was based was served on 1st September 2007, and the firm was not named as a party although there were specific orders against them. Further, that although their advocates applied for an adjournment, the application was rejected. An extract of the proceedings for that day shows as follows;

Date 4.9.2007

Coram – Warsame J

Court clerk – Ojuki

Mr Karungo for applicant

Mr Oduo for defendant

Miss Raikundalia holding brief for Taj – Interested party

MR KARUNGO – *Nothing has been filed in opposition to the application and I rely on the supporting affidavit of the application.*

MISS RAIKUNDALIA – *They were served on Friday as Mr Taibjee is out of town.*

MR ODUOL – *The position is fairly clear, as certain documents were set out the firm of Taibjee and Bhalla Advocates for Charterhouse and those documents have been called back but the Advocates have refused to release the documents. The statutory manager has given an undertaking as to fees and that indemnity was accepted by the firm of Taibjee and Bhalla but only for them to turn round, saying that the statutory manager was not the manager of charterhouse bank. We are ready to undertake their fees even before this court.*

COURT – *As there is no reply to the application dated 31.8.2007 and there is no sufficient or reasonable grounds for adjourning the matter as stated by Mr Oduol Advocate. I do not think it is right to delay this somewhat simple and straight forward matter. The documentations and facts outrightly and extremely clear to warrant any further delay of the matter. I therefore grant orders sought in the application dated 31.8.2007 with no orders as to costs. The firm of Taibjee and Bhalla Advocates to release the documents within the next 7 days.*

M. WARSAME

JUDGE

7. After the decision was made, the petitioners consequent upon filing a notice of appeal, filed an application in the Court of Appeal seeking orders, “*That all further proceedings in the High Court Suit No. 626 of 2006 be stayed pending the hearing and determination of the intended appeal against the ruling and orders of the Superior Court, Warsame J delivered on 4th September 2007.*” In the course of the hearing, the petitioners abandoned the application for stay of proceedings. By a ruling delivered on 9th November 2007, the Court of Appeal ordered stay of execution of costs taxed against the petitioners.

Petitioners’ Case

8. The petitioners’ case, set out in the petition dated 24th October 2007, is that the orders issued by Warsame J., on 4th September 2009 violated their rights under **sections 70(a), 77(i) and 77(9)** of the former Constitution. In essence they complain that they were not parties to the proceedings and the decision was reached without hearing them in breach of the fundamental rules of natural justice. They state that they were not afforded reasonable time and opportunity to respond to the application which directly affected them and that the order violated the fundamental tenets of a fair process.
9. The petitioners also claim that their right to life protected under **section 71(1)** of the former Constitution has been violated as the order was made without taking into account their right to livelihood or to earn a living which is an integral component of the right to life. They contend that no consideration was given to their right to professional fees or indemnity in respect of return of security documents to the interested parties and that they were unjustifiably and unlawfully condemned to pay costs.
10. The petitioners pray for declarations that their rights were violated and consequential orders

staying or setting aside the orders which violate their fundamental rights.

Respondent and interested parties case.

11. The respondent and interested parties have all opposed the petition and have filed written submissions to support their respective arguments.
12. The respondent filed a Notice of Preliminary objection dated 4th December 2007 in which it states that the petition does not raise any constitutional issues and that the petitioners have not appealed nor exhausted remedies provided under the *Advocates Act (Chapter 16 of the Laws of Kenya)*.
13. Kenya Commercial Bank filed a Notice of Preliminary objection dated 7th November 2007. The grounds therein were, inter alia, that the petitioners lacked *locus standi* to seek any form of relief as the security documents were released to Charterhouse Bank by Kenya Commercial Bank on a strict undertaking; that the petitioners had filed a notice of appeal against the decision of Warsame J., and had indeed applied for a stay of proceedings in the Court of Appeal; and that the matter does not raise any constitutional issues.
14. Similar grounds are raised by Charterhouse Bank in the Notice of Preliminary objection dated 6th November 2007 and also by Central Bank in a Notice of Preliminary objection dated 6th November 2007. The interested parties, in a nutshell, all contended that the petition does not raise any issues that require interpretation of the Constitution in so far as it relates to a ruling handed down by the court and the petitioners' remedy is an appeal therefrom. They reiterate that the petitioners have filed a notice of their intention to appeal to the Court of Appeal which is the right forum to canvass and determine the issues raised in the petition. Consequently they argue that the petition is an abuse of the court process and should be struck out with costs.

Determination

15. The issue for consideration, which we set out at the opening paragraph of this judgment, is the only issue necessary to dispose of this matter. It is not *res nova*. It has been subject of consideration both by this court and the Court of Appeal. For reasons that shall become apparent, we shall not deal with the other matters raised that relate to the dealings and transactions between the parties and which are the subject of the civil suit and intended appeal.
16. In the case of *Peter Ng'ang'a Muiruri v Credit Bank Limited & Others Nairobi Civil Appeal No. 203 of 2006 (Unreported)*, the Court of Appeal held that **section 84** of the former Constitution did not permit the High Court to intervene in concurrent proceedings of the High Court. In that case, the applicant applied for declarations that his rights and fundamental freedoms had been infringed by a decision of the Court of Appeal. When the matter was placed before the Chief Justice for directions, the Chief Justice ruled that the issues raised did not merit constituting a "Constitutional Court." The applicant then took out a notice of motion seeking declarations that the orders of the Chief Justice denied him fundamental rights and freedoms. In the course of his decision, Justice Nyamu stated, "*When a challenge is directed at a Judge's order or ruling pursuant to section 84 of the Constitution a Judge of the High Court has jurisdiction by virtue to (sic) section 84(1) and (2) of the Constitution to hear the challenge The exercise of this Jurisdiction by any Judge of the High Court is not based on rank and it ought not to be a source of unpleasantness but a big credit to our system of justice. The question is therefore no longer whether such a challenge can be entertained but rather to what extent can another court intervene. I see no inconsistency with the status and dignity of a Judge that his decision should be subject to a constitutional challenge.*"
17. The Court of Appeal rejected this line of reasoning and clarified the jurisdiction of the High Court. In that regard, we think it is proper to set out what the Court stated in order to emphasise this point. It stated thus; "*We want to set the law straight on the jurisdiction of what the learned Judge called "the Constitutional Court." 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 “Lillian” vs Caltex Oil Kenya Ltd [1989]KLR 1* “Jurisdiction is everything. Without it, a court has no power to make one more step.””

18. Ms Opiyo, learned counsel for the petitioners, valiantly argued that the case of ***Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1979] AC 385*** is authority for the court to intervene in circumstances such as the petitioner’s find themselves in. In ***Methodist Church of Kenya, Registered Trustees & Another v Rev. Jeremiah Muku and Another CA Civil Appeal No. 233 of 2008 (Unreported)*** the Court of Appeal observed that, “[I]t is only in rare cases that an error in the judgment or order of a court can constitute a breach of human right or fundamental freedoms. It is also clear from the quotation that ordinary errors made in the course of adjudication by courts of law should be cured by invoking the mechanism and procedures prescribed by the ordinary law for correction of errors such as appeal or review.” The quotation the Court of Appeal referred to was in the case of ***Maharaj v Attorney General of Trinidad and Tobago (Supra at 399)*** where the Privy Council held that, “In the first place, no human right or fundamental freedom recognized by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person’s serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was an error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a); and no irregularity in procedure is enough, even though, it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event...”
19. In simple terms, the principle now well established, is that a litigant will not be permitted to challenge the decision of a High Court Judge by filing a separate petition, in the Constitutional and Human Rights Division or any other division of the High Court, to challenge the judgment or order under the guise of an application to enforce fundamental rights and freedoms. (See generally our decisions in ***Philip Kipchirchir Moi v Attorney General Limited and Another Nairobi Petition No. 65 of 2012 (Unreported)***, ***Robert Mwangi v Shepherd Catering and Another Nairobi Petition No. 89 of 2012 (Unreported)***, ***John Githongo and Another v Harun Mwau and Others Nairobi Petition No. 44 of 2012 (Unreported)***)

20. The petitioners before us have a remedy which they have indeed invoked. The record is clear that they have evinced a clear intention to appeal and are indeed the beneficiaries of an order of stay from the Court of Appeal. They are intent on pursuing the ordinary remedies available to them and it cannot be said that their fundamental rights and freedoms have been violated.

Disposition

21. It is abundantly clear that the petition is an abuse of the court process and it must be dismissed and it is hereby dismissed with costs to the respondent and interested parties.

DATED and DELIVERED at NAIROBI this 31st day of July 2013.

I. LENAOLA

MUMBI NGUGI

D.S. MAJANJA

JUDGE

JUDGE

JUDGE

Ms Opiyo instructed by J.A. B. Orengo Advocates for the petitioner.

Mr Kakoi, Litigation Counsel instructed by the State Law Office for the respondent.

Mr Ogunde instructed by Walker Kontos Advocates for 1st interested party.

Mr Abidha instructed by Ochieng' Onyango Kibet and Ohaga Advocates for the 2nd interested party.

Mr Odera instructed by Oraro and Company Advocates for the 3rd interested party.