



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APPLICATION 181 OF 2012

PETER O. NGOGE.....APPLICANT

AND

THE VETTING OF JUDGES & MAGISTRATES BOARD.....1ST RESPONDENT

THE MINISTER FOR JUSTICE AND .CONSTITUTIONAL AFFAIRS.....2ND RESPONDENT

RULING

The Application

1. The Chamber Summons dated 2nd May 2012 has been brought by Peter O.Ngoge. The applicant is an advocate of the High Court of Kenya and represents himself in these proceedings. The application is made under **Order 53 rules 1, 2, 3** of the **Civil Procedure Rules, Section 8 and 9** of the **Law Reform Act** and **Articles 10, 20, 22, 23, 27, 34, 35, 47, 50** and **159** of the Constitution. It seeks the following orders;

(1) *The application be certified urgent.*

(2) *The applicant be granted leave to apply for orders of certiorari to issue, to remove forthwith to this Honourable Court for the purposes of quashing the ruling decision of the 1st respondent readout to the general public on the 25th April 2012 by the 1st respondents Chairman Mr Rao at the Kenyatta International Conference Centre after violating the provisions of Articles 10, 20, 27, 34, 35, 47 and 50 of the Constitution by locking out the complainants, the media and the General public from covering , accessing, following up, monitoring or attending the vetting proceedings of Court of Appeal judges which was conducted on various dates secretly on the 22nd floor of the Anniversary Towers Nairobi in violations of Article 10 of the Constitution.*

(3) *The applicant be granted leave to apply for orders of prohibition to be issued to restrain the 1st respondent and the 2nd respondent from continuing to vet judges and magistrates in camera excluding the general public, the complainants and the media from accessing or attending its proceedings or from accessing any documents filed by the complainants and the judges in response to complaints contrary to Articles 10, 20, 27, 34, 35, 47 and 50 of the Constitution.*

(4) *The applicant be granted leave to apply for orders of mandamus to be issued to compel the 1st respondents and 2nd respondents to open up the vetting proceedings of judges and magistrates to the complainants, the general public and the media in accordance with Articles 10, 20, 27, 34, 35, 47 and 50*

of the Constitution and thereafter to commence afresh serious, genuine and legitimate vetting proceedings of the judges of the court of Appeal transparently after complying with the provisions of Article 10 of the Constitution.

(5) *The grant of leave do operate as stay of execution of the ruling/decision of the 1st respondent given on the 25th April 2012 and stay of the ongoing secretive vetting of judges and magistrates which is being conducted secretly on the 22nd floor of the Anniversary Towers Nairobi in violations of Articles 10, 20, 27, 34, 35, 47 and 50 of the Constitution.*

(6) *The costs of this application be borne by the respondents.*

2. The application is supported by affidavit of Peter Ngoge sworn on 2nd May 2012. In summary the applicant is aggrieved by the decision of the Vetting of Judges and Magistrate's Board ("the Board") given on 25th April 2012 titled "**Determinations Concerning the Judges of the Court of Appeal**" hereinafter referred to as "the decision." In the decision, the Board made certain findings as to the suitability of the Judges of the Court of Appeal in terms of **section 23** of the **Sixth Schedule** to the Constitution.

3. Mr Ngoge complains that he was condemned unheard contrary to the rules of natural justice in that he was not notified of the hearings which were conducted in camera and he was not given an opportunity to present or prove his complaints in violation of **Article 10, 22, 34, 35, 47 and 50** of the Constitution. He also contends that he was discriminated against contrary to **Article 27** of the Constitution as he was not mentioned in the decision as one of the complainants, Mr S. K Macharia.

4. The gravamen of Mr Ngoge's complaint in respect of violation of his rights is that he filed various complaints against each judge of appeal being vetted and he ought to have been heard in respect of each and every complaint. He also asserts that he should have been given an opportunity to review each judge's response to his complaint.

5. He further complains that he was the subject of adverse comment at Part VIII titled "**FINDINGS AND DECISION,**" Paragraph 3, page 11 of the Board's decision where it was observed that;

(3) A series of complains in this regard were made by an Advocate – whom I shall not name for reasons of confidentiality. The judge's response though dealt adequately with the complaints. The Board noted that that particular Advocate had laid complaints against every judge of the Court of Appeal, all basically to the effect that they are unfairly hostile to him and discriminate against him and therefore against his clients. Some of these complaints were even sent on to the United Nations, the International Criminal Court and other bodies. Clearly, there has been a complete breakdown of trust and professional respect between the Advocate concerned and the judiciary, with negative consequences all around. The situation calls for intervention by the Law Society of Kenya (LSK) with a view to achieving an appropriate remedy. The Board will contact the LSK in this respect. It is not in a position to make a finding against the judge in respect of these complaints.

6. Mr Ngoge argues that these remarks, which were adverse, were in reference to him since he filed complaints against all the Judges of Appeal. By stating that it would refer the situation to the Law Society of Kenya (LSK) for an appropriate remedy, Mr Ngoge asserted that the Board violated his rights. He urged the court to intervene and vindicate his fundamental rights and freedoms as this reference to him by the Board affected him negatively in the eyes of his clients and the public.

7. On the basis of this facts, Mr Ngoge urged the Court to grant leave to commence judicial review proceedings and for such leave to operate as a stay of the proceedings of the Board as he had established an arguable case to proceed to the substantive stage. He stated that the Board must be guided by the values of the Constitution and this court must not allow the Board to violate his fundamental rights. Mr Ngoge further argued that by failure to consider his complaints, he would be denied the opportunity to invoke the special jurisdiction of the Supreme Court under **section 14** of the **Supreme Court Act** which

entitles the Supreme Court to review judgments and decisions of any judge removed pursuant to the provisions of the *Vetting of Judges and Magistrates Act, 2011* (“the VJMA”).

The Respondents’ Case

8. When the application came up for hearing *ex-parte* on 4th May 2012, I ruled that the issues raised were of constitutional importance. I therefore directed that the respondents be served and matter be heard inter-parties in accordance with the proviso to **rule 1** of **Order 53** of the *Civil Procedure Rules*. The respondents duly attended Court and were heard in opposition.

9. Mr E.Mutua, learned counsel appearing for the Board, resisted the application on the ground that Court lacks jurisdiction to intervene in matters of Board under the Constitution. As regards whether the proceedings should be heard in public, counsel submitted that the **section 19(5)** of the VJMA is clear that the proceedings are private except at the instance of the judicial officer concerned. On the whole, Mr Mutua was of the view that there were no grounds shown to warrant this Court’s intervention.

10. Mr E.Bitta, learned counsel for the Attorney General, concurred with the brief submissions by Mr Mutua. He added that this Court could not intervene in Board proceedings as this was barred by **section 23** of the **Sixth Schedule** to the Constitution.

Disposition

11. At the leave stage, the court has wide discretion to allow or reject the application for leave. The test is whether the applicant has an arguable case which can be heard when the substantive motion is filed. In the case of *W’Njuguna v Minister of Agriculture (2000) 1 EA 184* the Court of Appeal stated, **“That test as to whether leave should be granted to an applicant for Judicial Review is whether, without examining the matter in any depth, there is an arguable case that the reliefs might be granted on the hearing of the substantive application.”**

12. This matter concerns the vetting of judges and magistrates which is carried out pursuant to the provisions of **section 23** of the **Sixth Schedule** to the Constitution and which provides as follows:-

23(1) Within one year after the effective date Parliament shall enact legislation which shall operate despite Articles 160, 167 and 168, establishing mechanism and procedures for vetting within a timeline to be determined by the legislation, the suitability of all Judges’ and Magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Article 10 and 159.

(2) A removal, or a process leading to the removal of a judge from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question, in, or review by, any court.

13. Pursuant to these provisions, Parliament enacted the *Vetting of Judges and Magistrates Act, 2011 [Act No. 2 of 2011]* which came into force on 22nd March 2011. **Section 6** of the VJMA establishes the Board and **section 13** provides for the functions of the Board as being, **‘To vet judges and magistrates in accordance with the provisions of the Constitution and this Act.’** The Board, as constituted, therefore exercises a mandate and function vested in it by the Constitution and the VJMA.

14. The Board has now completed its work in respect of the vetting of Court of Appeal Judges subject to the right of review under the VJMA. In light of **section 23(2)** of the **Sixth Schedule** to the Constitution, the Board’s decision is part of a process leading to removal of a judge and cannot be the subject to question in, or review by, any court.

15. In substance, the Mr Ngogeseeks to review the decision of the Board in so far as it applies to complaints lodged by him. This would be a collateral attack on the Board’s decision and is not permitted by the Constitution itself. In the case of *Dennis Mogambi Mong’are v Attorney General and Others*

Nairobi Petition No. 146 of 2011 (Unreported), the Court held that the **Sixth Schedule** is part of the Constitution and could not be challenged on the basis of any inconsistency with the Constitution.

16. The order of certiorari, if granted, would lead to quashing the decision of the Board. It is therefore in conflict with the direct provisions of the Constitution and in these circumstances, these proceedings in so far as they would lead to a re-opening or reconsideration or review of the Board's decision or process leading to the removal of a judge cannot lie in law and are not permitted by the Constitution.

17. I agree with the Mr Ngogethat where there is a breach of natural justice, this Court must intervene to correct such a violation. The proceedings under the VJMA are *sui generis*, the Board is empowered to regulate its procedure and in so doing receive complaints. A challenge to the Board's procedure agitated by the applicant would inevitably lead to questioning the decision of the Board. That exercise would inevitably breach the wall established by the Constitution to protect the decisions and process of the Board.

18. As regards the comments made by the Board in reference to an unnamed advocate, it is clear that the Board took into account the values of the Constitution and the rights of the unnamed person in declining to the name the person referred to. I cannot conceive any infringement of the applicant's rights in this case. If the applicant is aggrieved by the fact that he is the unnamed person condemned, he must await action by the LSK on the issue referred to it. It is at that stage that Mr Ngoge, if he is the subject of the consideration by the LSK, will have all the rights to a fair hearing accorded to him.

19. Finally, Mr Ngoge challenges, by seeking orders of prohibition and mandamus, the provisions of the VJMA that exclude the public from hearings of the Board. In the case of ***Dennis Mong'are v Attorney General (Supra)***, the court held that the provisions for confidentiality were intended to protect the inherent dignity of judges and magistrates accorded to them by the Constitution. Quite apart from the fact that the applicant has sought to re-open the decision of the Board, this court is not permitted, directly or indirectly, from proceeding with this inquiry.

Conclusion

20. To allow this application in the circumstances of this case would be to circumvent the constitutional prohibition inherent in **section 23(2)** of the **Sixth Schedule** to the Constitution. This court has no jurisdiction to embark on the inquiry suggested by the applicant and it must therefore down tools.

21. ***“Jurisdiction is everything. Without it, a Court has no power to make one more step.”*** (See ***Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] KLR 1, 14*** per Nyarangi JA)

22. The Chamber Summons dated 2nd May 2012 is struck out with no order as to costs.

DATED and DELIVERED at NAIROBI this 7th day of May 2012.

D.S. MAJANJA
JUDGE

Mr O. P. Ngoge appeared in person.

Mr E. Mutua, instructed by E. K. Mutua and Company Advocates for the 1st respondent.

Mr E. Bitta, Senior Litigation Counsel, instructed by the State Law Office for the 2nd respondent.