REPUBLIC OF KENYA

High Court at Bungoma

Civil Suit 42 of 2012

MOSES WAMALWA MUKAMARI.....PLAINTIFF

VERSUS

JOHN O. MAKALI.....1ST DEFENDANT

JOHN MUTALI WEKESA.....2ND DEFENDANT

HON ATTORNEY GENERAL.....3RD DEFENDANT

JULIUS K. NG'ARNG'AR.....4TH DEFENDANT

RULING
INTRODUCTION

The Application

[1] This ruling relates to the application dated 25th/7/2012 by the 4th Defendant, which is made by way of Chamber Summons and is praying for orders:

1) That this Honorable court be pleased to strike out the name of the 4th Defendant from the suit

2) That the costs of this application and of the suit against the 4th Defendant be borne by the plaintiff/respondent.

[2] The application stands on the affidavit of the 4th Defendant and the grounds on the face of it.

Service of the Application

[3] On 2nd of October, 2012, Justice A.O. Muchelule made an order that this application be heard before me on 17th October 2012. On 17th October 2012, only the advocate for the 4th Defendant was present for the hearing of this matter, hence the need to ascertain service.

[4] Mr. Situma for the 4th Defendant confirmed that Notice for the hearing of the application had been served on all the parties including the Plaintiff who was served on 3rd October 2012 at Lugulu Market. The advocate referred the court to the Affidavit of Service by Peter Masika, a private process server, which was sworn on 16.10.2012 and filed in court on 17.10.2012. Mr. Situma invited the court to the remarks made by the process serve at the back of the Hearing Notice that was served, a copy of which is

annexed to the Affidavit of service, to the effect that the plaintiff had been served on 3rd October 2012 at Lugulu Market but he declined to sign.

[5] I note from the record that the same process server had earlier on served the plaintiff with court process at Lugulu Market, and particularly served a hearing notice for this application on 24th day of September 2012. It is apparent he knows the plaintiff, and where to find him. Other parties acknowledged the service of the Hearing Notice for 17th October 2012. I am convinced all parties were properly served with the Hearing Notice for 17.10.2012.

[6] The court having been satisfied that service of Notice for the Hearing of the instant application on 17.10.2012 had been properly served upon the other parties, it allowed the 4th defendant's advocate to argue the application.

Quite Unpleasant Exchanges

[7] Before I proceed to the thrust of the application before me, I have noted quite unpleasant exchanges in this matter, which are bitter, characterized by complaint upon complaint by the plaintiff against some parties herein, made to the 4th Defendant, the Resident Judge Bungoma and to the Chief Justice. This will, however, not be part of the decision of the court except it caught the attention of the court, and seems to be a cry for justice, which perhaps should be an indication that the case should be heard expeditiously.

THE 4TH DEFENDANT'S ARGUMENTS ON THE APPLICATION

[8] The application, as I have recited in the first part of this ruling, is seeking the removal of the name of the 4th defendant as a party in the suit. The major grounds of the application are:

1) That the 4th defendant has been improperly joined as a party in this suit.

2) That the 4thdefendant, who is a judicial officer, merely discharged his duties when he issued orders that are the cause of action in this matter.

3) That the defendant cannot be sued in his private capacity for what he did as a judicial officer

4) That the suing of the 4th defendant is contrary to the spirit of the constitution.

[9] There are other minor grounds with an extremely tenuous difference from the ones listed above. I will not lose them and will be fully considered within the major grounds above. None of the other parties, who were served with the application herein, filed any response to the application.

ISSUE FOR DETERMINATION

[10] From the application and submissions by the advocate for the 4th defendant the court is of the considered opinion that the following singular issue emerges:

1) Whether a judicial officer can be sued in a personal capacity on an act or omission in the lawful performance of a judicial function.

DISPOSITION OF THE ISSUE BY COURT

The Plaint

[11] It is important for the court to set out the averments in the plaint that relate to the 4th Defendant to establish the capacity in which the 4th Defendant has been sued; for an act he did in the lawful performance of a judicial function. Below are some relevant excerpts from the plaint filed in court on

30.3.2012:

2.0 The forth (sic) defendant is sued in his private capacity as a magistrate at Bungoma Chief Magistrate court.

2.1 The plaintiff avers that the fourth defendant deliberately and maliciously failed to dispense justice impartially.

2.2. That he administered selective justice which violated the constitutional rights and liberty of the plaintiff.

2.5 The plaintiff avers that the fourth defendant conspired with the 1st defendant to defeat the course of justice.

Then in the prayers;

[12] ***REASONS WHEROF the plaintiff prays for judgment against the defendants jointly and severally for:***

a) General damages for his constitutional rights and liberty by detention at G.K. Prison Bungoma

b)…….

The Cause of Action

[13] It is apparent the cause of action is founded on an order made by the 4th defendant on 7th November 2011 committing the plaintiff to civil jail for two months on an application by the decree holder for Notice to show cause why the J/D should not be committed to civil jail for failing to satisfy the decree of the court. The question is whether the said judicial officer can be sued in person for actions done in the exercise of his judicial function?

The Legal and Constitutional Standing on the Issue

[14] The Applicant relies on Article 160(5) of the Constitution. In accordance with the said Article;

A member of the judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function

[15] The protection offered to judicial officers in Article 160(5) of the Constitution is inherent in the independence of the judiciary as state organ within the doctrine of separation of powers. The protection encapsulates protection from being sued in a personal capacity in a cause of action based on an act or omission emanating from the lawful performance of a judicial function. I am convinced; this is intended to make the cover against personal liability complete, especially to prevent the essential substance of the protection from oozing out. If it were to be the contrary, that kind of interpretation will result into an absurdity, because, allowing the officer to be sued and appear in his personal capacity in a suit based on an act he did in the lawful performance of a judicial function, will already have blown away the very constitutional cover for the officer's fallibility provided under Article 160(5) of the Constitution.

[16] The words used in Article 160(5) to wit; ***in the lawful performance of a judicial function*** are very specific, and refer to the undisputed fact that a judicial officer having been duly appointed, is bestowed on him judicial authority, and when he exercises it, it must be taken as a matter of law, is the lawful performance of a judicial function in the sense of the Constitution. Judicial function integrally involves adjudication of cases, which, by the oath of office, should be done without fear or favor. Except for extremely limited cases, when errors committed in the process of the performance of judicial function will found an action, in all other instances, other higher or supervisory means provided in the Constitution should be called upon to address the lapses. This should not however be confused with improprieties

attending conduct unbecoming a judicial officer which, are dealt with in accordance with the integrity provisions in the Constitution and other contemporary best practices. In this regard, Article 75(2) of the Constitution is particularly relevant.

[17] A restricted interpretation of Article 160(5) of the Constitution will not give effect to the objects, purposes and values of the Constitution, but will only create a pious hope of establishing an independent judiciary. The people of Kenya look to the judiciary ***to protect its rights; to define the bounds of legitimate exercise of public power; to administer equity; and to resolve social disputes in a just manner***. This noble role of the judiciary is what the Constitution safeguards by creating the protection in Article 160(5) of the Constitution. For this reason, a more balanced view on the interpretation of the Article is needed as opposed to a restricted approach, that bites at the very Centre nerve of the independence of the judiciary, negates the oath of office of judicial officers, and likely to make the officers most vulnerable, imbued with extreme fear and timidity every time they deliver a ruling or judgment. Such state of affairs will greatly diminish the kind of judiciary Kenya needs.

[18] The foregoing is not an overly extension of Article 160(5) of the Constitution, or a means to avoid public scrutiny and answerability of the judicial officers. On the contrary; it is aimed at enhancing judicious actions free from extraneous factors such as fear, favor or subservience, that will reward the national population in many respects including but not limited to ***consolidating a progressive and socially-rewarding governance-direction, as a basis for the rule of law, peace, stability and respectability of the nation.*** The Honorable Justice (Prof.) J.B. Ojwang, Justice of the Supreme Court of Kenya in most subtle manner, laid bare these benefits and more in his paper, ***The High court as the Model Superior Court: Design and challenges, 2012***. That is the best form of accountability. Without saying much, because nobody takes pride in the shameless and unnecessary 2007-2008 post-election events, the hindsight thereof, should not however be lost; that a weak and subservient judiciary is a sure recipe for real trouble. Therefore, Article 259 of the Constitution, I am convinced, will favor a purposive interpretation of Article 160(5), which, and I have already pointed it out, will return material and social advantages to the national population.

Case Law

[18] I observe no case law that was provided by the Applicant to amplify his devout argument that he cannot be sued in his personal capacity for something he did in the lawful exercise of a judicial function. In a constitutional moment we are in, building of, and reconciling the existing jurisprudence with the Constitution, is a task we must undertake as demanded in Article 259 of the Constitution on development of the law. I consider case law as one of the tools to achieve the onerous task. Case law will also reinforce the position I have taken in this matter. Other than Article 259 of the Constitution, I follow after the words of the Honorable Justices of the Court of Appeal in the case of **METHODIST CHURCH IN KENYA TRUSTEES REGISTERED & ANOTHER V REV. JEREMIAH MUKU & ANOTHER [2012] e KLR** that observed;

''In reaching the decision the High Court was guided by several decisions…which came to his attention through his own industry. A judge cannot be faulted for ascertaining the law.''

[19] I find the decisions of the Privy Council in the cases below, to offer contemporary illumination on Article 160(5) of the Constitution. They fully reinforce the view I have taken in this matter. The decision of the Privy Council in the case of **MAHARAJ V ATTORNEY GENERAL of TRINIDAD and TOBAGO (No. 2) [1978] All ER 670,** laid down the relevant principles, and that of **CHOKOLINGO V A-G of TRINIDAD and TOBAGO [1981] 1 All ER 244,** re-affirmed the position of the law stated in the former case**.** The **MAHARAJ** case was extensively quoted with approval by the Court of Appeal in the case of **METHODIST CHURCH IN KENYA TRUSTEES REGISTERED & ANOTHER V REV. JEREMIAH MUKU & ANOTHER [2012] e KLR.**

[20] I however, hesitate to quote the decisions of the Privy Council in these cases extensively, especially those parts which may create an impression that a decision of finality on the substantive issues in this case has been made. I will only quote the part that is pointedly relevant to the issue in the instant application

which is found at page 679 letters h-j;

''…In the second place, no change is involved in the rule that a judge cannot be made liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under section 6(1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of state. This is not a vicarious liability; it is a liability of state itself. It is not a liability in tort at all; it is a liability in the public law of the state, which has been created by section 6(1) and (2) of the Constitution.''

[21] The undoubted essence of the above decision of the Privy Council, which I respectfully agree with, is that, even if there be any liability, which is quite a rare incident, on a cause of action arising from the exercise of a judicial function, that liability is the liability of the state. That being the case, it will be contrary to the Constitution to enjoin the judicial officer in a suit challenging what he did in the lawful exercise of a judicial function. On this basis, the correct party in a proceeding such as this is the Attorney General, who is already a party in the suit, and does not suffer any deficiency or impairment in law as to require the judicial officer to be cited as a party. See the case of **CHOKOLINGO V A-G** of **TRINIDAD AND TOBAGO** wherethe Attorney General was substituted for the wrong party that had been sued in the case. Within this constitutional framework, the judicial officer has no role to play as, and is not even a necessary party who must be enjoined to enable the court to effectually and completely determine the real issues in dispute. Thus, it bears repeating, to allow a judicial officer to be named as a party in this suit, will not only violate the constitutional restriction on that kind of practice, but will also extend embarrassment to the judicial officer as well as the judiciary- a state organ exercising delegated sovereign power of the people. But a genuine question may be asked; by this approach of the law, is the plaintiff left without a remedy?

The Plaintiff is Not without Remedy

[22] The remedy of the Plaintiff in a case such as this is not founded on vicarious liability or tort. It is based on ***a liability of state itself...not of the judge himself-*** a subject governed by ***the public law of the state.*** Placing this type of liability within ***public law*** is founded on the concept of public trust created in the Constitution. It arises from the fact that judicial authority in Article 159(1) of the Constitution is the sovereign power of the people delegated to the judiciary under Article 1(3) (c) of the Constitution. It is this concept of public trust that is the buckler of the legal exposition in the decision of the Privy Council above into our jurisprudence that;

The claim for redress... for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of state.

[23] I am of the considered view that some of the major reasons the law has taken this position, and has placed liability in these kind of cases in ***the public law of the state***, is to reconcile the dichotomy created by two equally eminent constitutional principles; 1) to ensure that the law does not suffer wrong without a remedy; and, 2) at the same time preserve the integrity of the judiciary. This way, the reconciliation is achieved as the remedy of the Plaintiff is preserved, and the judicial officer is protected from personal liability. Except for emphasis, the plaintiff must establish that his case falls within the rare category of liability for infringement of human rights or fundamental freedoms by acts or omissions of a judicial officer in the exercise of a judicial function. The Attorney General, and I said this earlier, is already a party in the suit, and removal of the 4th Defendant from the proceeding will not therefore prejudice the plaintiff's case.

<u>THE DECISION</u>

[24] For those reasons, I find that the 4th Defendant being a judicial officer is by law, protected from being sued in person in a suit based on an act or omission done in the lawful performance of a judicial function. He was therefore, wrongly joined as a party in this suit. Accordingly, I order his name to be struck out from the suit. I order each party to bear own costs in view of the nature of this application and the surrounding circumstances as a whole.

Dated, signed and delivered at Bungoma this 29th day of October 2012

F. GIKONYO
JUDGE

In the presence of:

Mr. Murunga Advocate for the 1st Defendant