REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 156 of 2006

INTOIL LIMITED ……..... 1ST PETITIONER

TECAFLEX LIMITED……..... 2ND PETITIONER

VERSUS

THE PERMANENT SECRETARY, MINISTRY OF ENERGY.....1ST RESPONDENT

THE MINISTRY OF ENERGY…….....2ND RESPONDENT

THE MINISTRY OF TRADE & INDUSTRY…….....……....3RD RESPONDENT

KENYA PETROLEUM REFINERIES LTD……...…..…..…….....4TH RESPONDENT

THE HON. ATTORNEY GENERAL…….....….....5TH RESPONDENT

RULING

Introduction

1. The petition dated 23rd March 2006 was filed on 24th March 2006. On 12th March 2008, the parties appeared before the then Chief Justice, Honourable Evan Gicheru for directions. The Chief Justice directed that the matter be heard on the 26th and 27th of May 2008 before Justices Nyamu and Wendoh. The matter was however not heard on that date as the petitioners sought leave to amend their petition to incorporate changes in the law, including the enactment of the Energy Act, No. 12 of 2006.

2. The court record indicates that the matter did not thereafter proceed to hearing for various reasons, including an application by the petitioners to adduce viva voce evidence, and on the 7th of October 2010, it was again placed before the Honourable Chief Justice Evan Gicheru. The Chief Justice directed that the matter be heard by three judges of the High Court whom he would nominate. There is no indication on the record that submissions were made as to why the matter should be head by a three judge bench.

3. On 25th September 2011, the Honourable the Chief Justice Dr. Willy Mutunga gave directions with regard to the provisions of Article 165(4) of the Constitution. I shall revert to these directions later in this ruling.

4. On 10th February 2012, Justice Lenaola directed Counsel for the parties in this matter to address the court on whether the matter should be heard by a single judge or by a 3 judge bench. Pursuant to this order, on 16th March 2012, I directed that the parties address me on the 26th of March 2012 on why the court should refer the matter to the Chief Justice for the purpose of constituting a bench of an uneven number of judges to hear the matter on the basis that it raises weighty issues of law and ought to be heard by more than one judge. Due to the unavailability of Counsel for the parties on two occasions, arguments on this point were not made till the 17th of May 2012.

Submissions

5. In her submissions on behalf of the 2nd petitioner, Learned Counsel, Ms. Mate, argued that the directions by the former Chief Justice, Honourable Evans Gicheru, given on 7th October, 2010 have never been appealed against nor reviewed by the respondent or any court; that there is no law that permits this court to *suo moto* reopen and set aside the existing orders of the Chief Justice; that the directions given by the Chief Justice, Honourable Gicheru, constituted a judicial decision which is not capable of being set aside in the absence of an appeal or an application for review; that it would in any event be unjust to reopen the issue just because of the change of the holder of the office of the Chief Justice; that even if the directions of 7th October 2010 were given under the old constitution, the promulgation of the new Constitution does not take away the accrued right of the petitioner to be heard by a three Judge bench.

6. Ms. Mate took the view that the issue as to whether the matter should be heard by a three Judge bench was *res judicata* and urged the court to order that the file be placed before the Chief Justice for the purpose of constituting another three Judge bench to hear it. She relied on the case of **E.T -v- Attorney General and Another, Petition No. 212 of 2011**, where Majanja J agreed with the decision in **Booth Irrigation v Mombasa Water Products Ltd, Misc Civil Applic No.464 of 2004** that *res judicata* applies to constitutional petitions.

7. Learned Counsel, Mr. Wanga, appearing for the 1st 2nd 3rd and 5th respondents opposed the application for referral of the matter to the Chief Justice for the purpose of constituting a three judge bench. He submitted that the petitioners had failed to point out the weighty issues raised by the petition and how they raise substantial questions of law to warrant the exercise of the court's discretion under Articles 165(4) of the Constitution in favour of the petitioners.

8. Mr. Wanga submitted that this petition does not raise any substantial questions of law to warrant hearing by a three judge bench. He stated that the petition raised three main issues: whether Legal Notices numbers 139 of 2001, 167 of 2002 and 197 of 2003 contravene the petitioner's right to property under Article 40; whether the decision to expel the petitioners from the suppliers' co-ordination committee meetings violate the petitioners' rights under Article 36; and whether the Legal Notices offend the provisions of Article 27. He submitted that these issues are not novel and are dealt with by a single judge on a daily basis and in the event the petitioners are dissatisfied with that court's judgment, they have a right of appeal to the Court of Appeal and the Supreme Court if need be.

9. Mr. Wanga contended that in view of the amendments to the law, specifically the enactment of the Energy Act No. 12 of 2006, the petition does not raise matters of general public importance. He therefore urged the court to be guided by Article 159 with regard to expeditious disposition of matters in determining the application.

10. He referred the court to the decisions of this court in **Community Advocacy Awareness Trust & Others –v- Attorney General and Others, Petition No. 243 of 2011 and Gilbert Mwangi Njuguna –v- Attorney Genera**l **Petition No. 267 of 2009** in which the court considered the circumstances under which the court will refer a matter to the Chief Justice to constitute a 3 judge bench on the basis that it raises a substantial question of law as contemplated under Article 165(4).

11. Mr. Litoro, Learned Counsel for the 4th respondent, associated himself with Mr. Wanga's submissions and opposed the application for a three Judge bench. On the issue of *res judicata* as raised by

the petitioners, Mr. Litoro submitted that directions on the three Judge bench had been given on 7th October 2010 and the petition was subsequently amended to recognise the position under the new Constitution in order to entitle the petitioner to some of the remedies under Article 23, especially (23) (f) of the Constitution. He therefore submitted that Article 165(4) of the Constitution requires that a matter be referred to the Chief Justice if it raised substantial questions of law. It was his submission that a single judge of the court is competent to hear and determine this petition and he asked the court to dismiss the instant application. He relied on the case of **Gilbert Mwangi Njuguna -v- Attorney Genera**l (supra).

Findings

12. Two issues arise for determination in this matter at this stage. The first is whether the issue of referral of the matter to the Chief Justice for constitution of a three judge bench is *res judicata.* If it is, then the matter ends there. If it is not, then the court must address the issue whether the petition raises a substantial question of law to merit determination by a three judge bench. If it does, the court would be required to refer the matter to the Chief Justice to constitute the bench.

Res Judicata

13. The central argument by the petitioners through Ms. Mate is that the question of whether the matter should be referred to a three judge bench for determination had been determined by the then Chief Justice, Honourable Evan Gicheru, on 7th October 2010 and it is thus *res judicata;* that the directions of the then Chief Justice constitute a judicial authority and have never been appealed against nor reviewed.

14. The provisions in our law with regard to the doctrine of *res judicata* are to be found in Section 7 of the Civil Procedure Act which provides as follows;

'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'

15. I believe there is no dispute with regard to the operation of the doctrine of res judicata: the issue in the first suit must have been decided by a competent court; the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar; the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. Judicial precedents on this issue are clear and well settled. In **Karia and Another -v- the Attorney General and Others (2005) IEA 83;** the court upheld the decision in Karshe -v- Uganda Transport Limited where the court held as follows;

'once a decision has been given by a court of competent jurisdiction between two persons over the same subject matter, neither of the parties would be allowed to re-litigate the issue again or to deny that a decision had in fact been given, subject to certain conditions'.

16. **In Omondi -v- National Bank of Kenya ltd and Others (2001) EA 177** Ringera J, stated that;

'doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in or parties who could have been enjoined were not enjoined.'

and in **Njangu -v- Wambugu and Another Nrb HCCC No. 2340 of 1991**, it was held that the essence of the doctrine of res judicata is to bring litigation to an end.

17. The question, however, is whether the doctrine of res judicata applies to directions with regard

to the hearing of a matter. Do a judge's directions on a matter amount to the matters ***'substantially in issue'*** between the same parties being ***'determined'*** so as to bar the court from subsequently changing those directions should a change in the law or circumstances so demand?

18. The word 'directions' in its plain and ordinary meaning means instructions on how to reach a destination or about how to do something. See the **Concise Oxford English Dictionary 11th Edition Black's Law Dictionary 8th Edition,** defines the term **'directions'** as meaning **'an order',** an instruction on how to proceed.

19. Taking the ordinary meaning of the term 'directions' as set out above, the giving of directions with regard to the hearing of a matter is not, in my view, a determination or adjudication of a matter that would lead to the application of the doctrine of res judicata. I take the view that should circumstances so require, the court is entitled to change the directions previously given with regard to the hearing of a matter without falling afoul of the doctrine of *res judicata*.

20. This petition was filed more than six years ago, and a lot has changed, both in the statutory regime under challenge, but also the constitutional dispensation under which the matters in issue arose. The petitioners, in recognition of these changes, applied for leave to amend their petition and brought in prayers for remedies available to a party under the new Constitution. Part of the requirements under the Constitution is that a matter be certified, under Article 165 (4), as raising a substantial question of law before it can be referred for determination to an uneven number of judges.

21. This obligation falls on the petitioners, and in this case, it is worth noting that Ms. Mate, while not disputing that the petition had been amended to reflect the position under the new Constitution and to claim reliefs under it, refused to recognise the burden placed on the petitioners by the provisions of Article 165(4). The petitioners were obliged, under the provisions of the Constitution and the directions by the Chief Justice of 25th September 2011, to demonstrate the weighty issues of law raised by the Amended Petition to warrant the referral of this matter to the Chief Justice under Article 165(4)

Whether the Petition Raises a Substantial Question of Law

22. Article 165(4) of the Constitution sets out the benchmarks for referral of a matter to the Chief Justice to constitute a bench of an uneven number of judges to hear a matter. It provides as follows.

'Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.'

23. The term *'**substantial question of law***' has not been defined in the Constitution. However, this court has in several recent decisions interpreted the requirements of Article 165(4) of the Constitution with regard to what a **'substantial question of law'** means in determining what merits reference to the Chief Justice for the purpose of constituting a bench of an uneven number of Judges.

24. In **Community Advocacy Awareness Trust & Others –v- The Attorney General & Others High Court Petition No. 243 of 2011,** the High Court, observed as follows;

'**The** ***Constitution of Kenya does not define, "substantial question of law." It is left to the individual judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine a matter.***

25. The court then went on to cite the decision of the Supreme Court of India in ***Chunilal V. Mehta –v- Century Spinning and Manufacturing Co.*** **AIR 1962 SC 1314**, where the court, after considering a number of decisions on what the term meant, laid down the following test for determining whether a question raised in the case is a substantial question of law or not;

"the proper test for determining whether a question of law raised in the case is substantial would in our opinion, be whether it is of general public importance or whether it directly or substantially affects the rights of the parties and if so, whether it is either an open question in the sense that it is not finally settled by the Supreme Court or by the Privy Council or is not free from difficulty or calls for discussions of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial question of law."

26. Taking the above observation into account, the court in **Community Advocacy Awareness Trust & Others –v- The Attorney General (supra) o**bserved that in view of the fact that Kenya has a new constitution with an expanded Bill of Rights;

'.....then it would follow, that every question concerning our Constitution..... would be a substantial question of law. Each case that deals with the interpretation of the Constitution..... would be a substantial question of law as it is a matter of public interest, affects the rights of the parties, is fairly novel and has not been the subject of pronouncement by the highest court.'

27. In **Gilbert Mwangi Njuguna –v- Attorney Genera**l **Petition No. 267 of 2009,** this courtheld that ifevery matter brought under the new Constitution was considered substantial, it would effectively defeat the objective of expeditious justice set out in **Article 159(2) (b)** of the Constitution that provides that justice shall not be delayed and therefore the court should consider each case on its merits and determine whether a particular matter ought to be referred to the Chief Justice for constitution of a three judge bench to hear it.

28. Finally, parties must bear in mind and heed the very clear and unequivocal directions of the Chief Justice, Honourable Willy Mutunga, in **Stanley Waweru Kariuki -v- Attorney General, Petition No. 13761 of 2003** where his Lordship expressed himself as follows;

'After perusing the order of the court I am not satisfied that the 'matter certified by the court as raising a substantial question of law...' was based on any substantive legal arguments made before the court by counsel, and subsequently considered by the court as satisfying the provisions of this Article. I therefore order that this matter be placed before the Judge who made the order and if the Judge is no longer in the station, then the matter shall be placed before the Head of Division or the Resident Judge who shall then hear more arguments, including those of the respondents and interested parties, and thereafter make a decision that gives reasons why the matter should be certified as raising substantial questions of law for me to empanel a bench of uneven number of judges, being not less than three. If the judge is of the view, after hearing arguments, that no substantial question of law under this Article can be certified as such, then the judge will proceed to hear the application on a priority basis until it is concluded and determined.'(Emphasis mine)

29. The Honourable Chief Justice went on to state that

'I believe if this procedure is followed, it will become an important filter to casual arguments that counsel appearing before judges make and subsequently get orders that have the possibility of clogging or even paralyzing other causes before the High Court.....the directions will thereafter become a practice note to be adhered to by all judges of the High Court.'(Emphasis mine)

30. One of the core principles that the Constitution enjoins courts to follow in exercising judicial authority is, as set out in Article 159 (2)(b), that justice shall not be delayed. This petition was filed in 2006, and has been pending in court for the last six years. For the matter to be referred to the Chief Justice for the Constitution of a three judge bench to hear the matter, bearing in mind the age of the case and the difficulty of releasing three judges to hear every matter that a litigant considers raises a substantial question of law requires that the substantial question of law be fairly well articulated. In this case, Ms. Mate has not even attempted to address the court on the weighty issue that the petition raises. It was left to Counsel for the respondents to point out the issues for determination in the petition, namely the effect

of Legal Notices Numbers 139 of 2001, 167 of 2002 and 197 of 2003 on the petitioners' rights under Articles 27 and 40, and whether the decision to expel the petitioners from the suppliers' co-ordination committee meetings violate the petitioner's rights under Article 36.

31. Having considered the petitioners' case as set out in the Amended Petition and affidavits in support, and in the absence of any submissions by the petitioners on the substantial question of law raised by the petition, I am unable to find any basis for referral of this matter to the Chief Justice for the constitution of a bench of an uneven number of judges to hear it. I would be failing in my duty as directed by the Chief Justice if I were to refer the matter simply on the basis, as argued by the petitioners, that the Hon. Evans Gicheru, Chief Justice (as he then was) had directed that the matter be heard by a three judge bench. The Hon. Chief Justice Willy Mutunga, was, I believe, fully aware that such directions had been given by his predecessor in various matters when he issued his practice directions which I have reproduced verbatim above.

32. For the above reasons, I decline to certify this matter as raising a substantial question of law under Article 165(4) of the Constitution and direct that the parties take an early hearing date before me for the expeditious disposition of this long outstanding matter.

Dated Delivered and Signed at Nairobi this 22nd day of November 2012

MUMBI NGUGI
JUDGE

Ms Mate instructed by the firm of Iseme, Kamau & Muema Advocates for the Petitioners.

Mr. Wanga instructed by the firm of Waweru Gatonye & Co. Advocates for the 1st, 2nd ,3rd and 5th Respondents.

Mr. Litoro instructed by the firm of Kaplan & Stratton for the 4th respondent.

MUMBI NGUGI
JUDGE