



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Civil Suit 1382 of 2003

PETER NG'ANG'A MUIRURI PLAINTIFF

VERSUS

CREDIT BANK LTD

CHARLES AYAKO NYACHAE T/A NYACHAE & CO. ADVOCATES DEFENDANTS

RULING

The application before me is dated 10th February 2005 and is expressed to be brought under O L Rules 1, 2 and 3 of the Civil Procedure Rules, Section 3A of Civil Procedure Act and S 70(a), 77(9) and 84 of the Constitution of Kenya and Rule 10(d) of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules 2001.

The application seeks three declarations:

- 1) A declaration whether or not fundamental rights and freedoms of the plaintiff were violated by decision and the order made by Mr Evan Gicheru the Honourable Chief Justice herein on 5th February 2004 pursuant to a mention for directions on 17th December, 2003 thereby denying the applicant access to the constitutional court and denying him a hearing by an authority lawfully appointed to hear constitutional issues.
- 2) A declaration whether or not the decision and order by the Honourable Chief Justice on 5th February 2004 on a mention for directions was in excess of or without jurisdiction
- 3) A declaration whether or not in the event that the decision of the Honourable Chief Justice on 5th February 2004 and the order of costs therein as well as the process of taxation of costs before Mrs Matheka Principal Deputy Registrar and the costs taxed and allowed therein on 24th June 2004 in the sum of Kshs 63,110 and any consequential process and orders therein for enforcement of costs are null and void or violated the applicants rights and freedoms.

In addition the orders sought are:

- 4) That a writ of prohibition do issue prohibiting execution of costs allowed and certified due and payable by the applicant to the 1st and 2nd defendants pursuant to orders herein by the Honourable Chief Justice on a Mention for directions on 5th February 2004.
- 5) That a writ of mandamus do issue directed at the Honourable Chief Justice in his administrative capacity to give directions and to constitute a constitutional court for enforcement of the applicants rights.

6) That pending the determination of questions above all further proceedings for taxation of costs and for execution against the applicant of any orders for costs be stayed.

7) Costs be provided for

The applicant has relied on skeletal submissions filed in court on 29th March 2005 and on cases appearing in the list of authorities dated 21st March 2006.

The 1st and 2nd defendants have by a preliminary objection dated 14th June, 2005 raised the following points.

1) That the application is misconceived bad in law, mischievous and gross abuse of the Constitution and the Honourable court's process

2) That no constitutional issue has been demonstrated to entitle the applicant to invoke the constitutional provisions cited herein or at all

3) That by conduct and record the applicant is estopped from making the present application having inter alia participated in subsequent proceedings herein

4) That a remedy if any against the Honourable the Chief Justice's order given on 5th February 2004 can only be by way of review or appeal and not by present application

5) That the application is fatal attempt to circumvent the law and to delay the matter

6) That from his conduct of filing applications in perpetuity the applicant is not interested in finalising this matter as the application does not seek to resolve the matter one way or the other and is instead meant to delay the respondents applications dated 6th December, 2004 filed in this cause and the one dated 10th February 2005 filed in HCCC No 3665 of 1991 which later application seeks to resolve the substantive issue herein once and for all.

The 1st and 2nd respondent relies on written skeleton arguments filed on 11th January 2006 and authorities attached thereto.

This application raises quite a number of fundamental issues and points of law. However, it is my view that the first task for this court is to make a finding on its jurisdiction. The ruling giving rise to the application was given by the Honourable the Chief Justice. It is therefore important to consider his position in the Judicature.

JURISDICTION

Section 60 which gives the High Court unlimited Original jurisdiction in criminal and civil matters has subsection (2) which reads

“The judges of the High Court shall be the Chief Justice and such number not being less than eleven of other judges (hereinafter referred to as puisne judges) as may be prescribed by Parliament.”

The starting point is therefore that the Chief Justice is a High Court judge and when he sits to hear a matter whose jurisdiction is vested in the High Court he does so in his capacity as a High Court judge and not as a Court of Appeal judge (a position he also occupies).

It is clear to the court that when he gave the ruling on 5th February 2004 which arose from a preliminary objection raised by the respondent concerning the hearing of the Originating Summons which in turn raised what the applicant considered to have been constitutional issues, he did so as a High Court

Judge. This being the position the Chief Justice was at that moment exercising coordinate jurisdiction similar to any other Judge of the High Court including myself. The question which arises from the above position is whether I have jurisdiction at all to hear this application and if so to what extent?

The Originating Summons dated 8th November, 2003 was premised on S 84 of the Constitution. The application was brought under S 84(1) of the Constitution and the ruling of the Hon the Chief Justice on the written Notice of Preliminary objection which has been set out above in extenso wherein the defendants claimed inter alia that the application was misconceived, bad in law and that no constitutional issue had been demonstrated to entitle the applicant to invoke the constitutional provisions cited or at all.

The other important point to note is that the applicant never raised any objection to the hearing in limine of the Notice of Preliminary objection by the Honourable the Chief Justice. It is clear to me that he is raising this matter again after the event. It is also equally important to note that he was given an opportunity to counter the objections and all the parties were accorded what is regarded as the right of equality of arms or equality of hearing if one chooses to use arbitration language and a final determination made. The applicant never contended as he would have been entitled, – that the preliminary objection could not finally dispose of the matter. Thus in the case of *MUKISA BISCUIT MANUFACTURING LTD v WEST END DISTRIBUTORS LTD* [1969] EA 696 at 701 Sir Charles Newbold (P) had this to say about preliminary objections:

“A preliminary objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The parties in this case must be deemed to have accepted that the preliminary point raised pure points of law and the ruling of 5th February 2004 by the Hon the Chief Justice is a ruling on those pure points of law as were raised in the Preliminary Objection touching on whether the Originating Summons raised any constitutional issues. In my view it disposed of the matter finally since its scope was to determine whether there were constitutional issues and upon such a determination as were made in a written ruling, by the matter could not move a step further. Although it is contended that the ruling was made in a mention the hearing was by consent of the parties.

It is therefore my considered view that the Hon the Chief Justice having made a determination under S 84(2) the only remedy open to the applicant is that which is set out in S 84(7) namely an appeal to the Court of Appeal. There is nothing left for another Judge of coordinate jurisdiction to hear. The subsection reads:

“A person aggrieved by the determination of the High Court under this section may appeal to the Court of Appeal as of right.”

SCOPE OF THE NOTICE OF MOTION DATED 10TH FEB 2005

Since there are two applications still pending in the Civil Division of the High Court I find that the applicant was entitled to file the Notice of Motion under Rule 10 of the Constitution of Kenya (Protection of fundamental rights and Freedoms of the Individual) Practice and Procedure Rules 2001 now repealed by the 2006 Rules.

The applicant contends that his right of access to a constitutional court was blocked but as clearly demonstrated above the Hon the Chief Justice was himself sitting as a constitutional court or a High Court judge when he heard the objection. This court Nyamu J has held in the case of *LABSON LTD vs MANULA HAULIERS LTD T/A TAUSI TRAVELLERS, MILIMANI COMMERCIAL COURT HCCC 204/2003 (unreported)* that the right of access is a fundamental right which could be lost if an applicant fails to adhere to the rules made under S 84(6) because the right of access is specifically made subject to the rules, or where an applicant ignores the general principles of law such as res judicata, estoppel, waiver just to give a few examples. In such situations the court when moved by any party can

summarily strike out or dismiss an application or where appropriate invoke its inherent jurisdiction. It is notable from the ruling by the Chief Justice that the Court of Appeal had finally determined the matters and that the applicant was making an attempt to have the same matters relitigated. I must however add that a constitutional court ought to bear in mind that each case has to turn on its own facts and circumstances and that the overriding principle is that the right of access to the court is as important as the right been canvassed and except in the plainest of cases procedural obstacles ought to give way to a hearing on merit. In the case of Kenya, S 84(6) is a condition precedent to the access. On the world scene the jurisprudence on the right of access suggests that procedural handles should not be used to deny litigants the right of access and in view of the clear constitutional provision making access conditional on complying with the rules, reforms on this will be necessary in any future constitutional changes or dispensation. The other example where the court may deal with a constitutional application summarily is where the constitutional process is being trivialized or abused. In **BOOTH IRRIGATION v MOMBASA WATER PRODUCTS LTD HC MISC 1052/2004** – MILIMANI unreported at pg 6-7 Nyamu J, held inter alia:

“I think it is apt to warn those litigants who might be tempted to subvert fundamental principles of law of bringing unmeritorious constitutional applications that our constitution shall and does uphold the fundamental principles of law because the Constitution is also aimed at achieving an orderly dispensation of justice. For this reason I hold that an automatic stay should not and cannot be sustained or maintained by an incompetent application and a constitutional court should be moved at the earliest opportunity to lift any such stay.”

Moreover although I do not agree fully with the former Chief Justice Apaloo’s definition of a constitutional issue in the case of **ODHIAMBO OLEL v R** (CR Appeal N 54 of 1989) where he defined a constitutional issue as:

“My own conception of a Constitutional issue when it relates to the interpretation of a provision of Constitution is that there are posed to the court, two or more conflicting interpretations of the Constitution and the Constitutional Court is asked to pronounce on which is the correct one.”

I say I do not subscribe to what to me is a restricted definition in that in the recent past and since the establishment of the Constitutional and Judicial Review Division the country has witnessed an explosion of litigation in this area which could only have been dreamt of in the two decades of 1980s and 1990s. A constitutional issue in my view is that which directly arises from the provisions of the Constitution or that which arises from court’s interpretation of the Constitution. For example – what is a fair trial is a constitutional issue and the courts have interpreted the meaning of a fair trial - See S 77 of the Constitution. However this was not the purpose of citing the former Chief Justice Apaloo’s definition of a constitutional issue. The purpose was to illustrate that the Hon the Chief Justice J.E. Gicheru was not the first Chief Justice to deal with a preliminary objection touching on a constitutional application. To crown it, the former Chief Justice Cockar in the case of **STEPHEN WAMWEA KABUE & 4 OTHERS v REPUBLIC** HC Misc CR A No.294 of 1996 unreported quoted former Chief Justice Apaloo in the above case and in holding 4 stated:

“Since the application for reference is merely frivolous and vexatious, I decline to constitute a three bench constitutional court. No good reasons exist for establishing of a constitutional court.”

In the matter before me the Hon the Chief Justice did not in the strict sense deal with the matter in a summary manner but did in fact hear and determine a preliminary objection. Former Chief Justice Cockar in effect summarily dismissed the Reference. Why is this matter not been contested before the Hon the Chief Justice? It is because the challenge to his ruling was made by way of a Notice of Motion in the proceedings. I presume that, I was appointed to hear the matter by the Honourable the Chief Justice because he could not hear a matter where his own ruling is challenged under the Fundamental Rights and Freedoms Provisions of the Constitution. S 84 states that the original jurisdiction to hear any allegations of the contravention or threatened contraventions is vested in the High Court. One cannot be a judge in ones own cause and the Chief Justice quite rightly declined to hear it. Some of us have held that the Judiciary being one of the three important arms of the State is a Guarantor of the fundamental rights and

freedoms just like the other two arms of Government namely the Legislature and the Executive. When a challenge is directed at a Judge's order or ruling pursuant to S 84 of the Constitution a Judge of the High Court has jurisdiction by virtue of S 84(1) and (2) of the Constitution to hear the challenge. The jurisdiction I am now exercising in this matter or any other High Court Judge placed in similar situation, does not certainly extend to considering or reviewing the merits of the ruling of another judge. In my view where there is a final order or ruling the jurisdiction extends to whether in the process or procedure adopted in obtaining the ruling there were any procedural improprieties which could have led to any violation or contravention of the fundamental rights and freedoms of the applicant e.g. was there a fair hearing as per the constitutional requirements or a breach of procedural and statutory requirements which are aimed at safeguarding a fair hearing. On the other hand where a court regardless of its status refuses to hear an applicant at all or is in clear breach of the applicants rights like sending him to prison for contempt contrary to the process of the law, the courts jurisdiction is in my view much wider. In this matter however the Chief Justice has even from his high office given an important signal for justice and as a result highlighted the importance of this limited jurisdiction in our country's Justice system. 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. This is a very rare jurisdiction but it has now being invoked in several cases. 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. In the MANULA case (supra) I observed inter-alia that in the case of Judges, the guard of the guards is the Constitution and the law. Indeed, the Hon the Chief Justice in his discretion, I would humbly suggest could seize the opportunity to take up himself those constitutional applications where the issues of status or the hierarchy of the court's is an issue so as to mitigate the distastefulness or the unpleasantness of the challenge by hearing the applications were the challenge for example springs from the Court of Appeal leaving the Court of Appeal to handle the appeals. Indeed in this case the Originating Summons springs from what the Court of Appeal is alleged to have done or not done.

Finally it is necessary to borrow from other comparable jurisdictions because when I made perhaps the first conservatory order invoking this jurisdiction eyebrows were raised. The Privy Council construed Section 14 (identical to one section 84) of the Constitution of Trinidad and Tobago, in the case of *THAKUR PERSAD JAROO v ATTORNEY GENERAL [2002] 5 R.C. 258* and at page 273 held as follows:

“... the appropriateness or otherwise of the use of the procedure afforded by Section 14(1) must be capable of being tested at the outset when the person applies by way of originating motion to the High Court. All the court has before it at that stage is the allegation. The answer to the question whether or not the allegation can be established lies in the future. The point to which Lord Diplock draw attention (in *HARRITSON v S.A.G. (1979) 31ALR 348 at 349*) was that the value of the important and valuable safeguard that is provided by section 14(1) would be diminished if it were to be allowed to be used as a general substitute for the normal procedures in cases where those procedures are available. His warning of the need for vigilance would be deprived of much of its value if a decision as to whether, resort to an originating motion was appropriate could not be made until the applicant had been afforded an opportunity to establish whether or not his human rights or fundamental freedoms had been breached ... their Lordships respectfully agree ... with the Court of Appeal that before he resorts to this procedure the applicant must consider whether having regard to all circumstances of the case, some other procedures either under the common law pursuant to statute might not more conveniently be invoked. If another such procedure is available resort by way of originating motion will be inappropriate and will be an abuse of the process to resort to it. If as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse.”

It is therefore quite evident that an aggrieved respondent may in certain circumstances raise objections which a court would be entitled to hear upfront concerning the competence of a constitutional application. In such a situation there is no denial of the right of access at all because the hearing of a preliminary objection is itself an exercise of the right access to the court.

Should the High Court be mistaken after a full hearing of a Preliminary objection on merit the applicants redress should be an appeal to the Court of Appeal. The Hon the Chief Justice in his administrative capacity, only appoints a bench and the Judge or the Judges so appointed proceed to hear the applications on merit or in appropriate cases hear preliminary points. In my view in this matter, the Chief Justice did not invoke his administrative jurisdiction but heard and determined the matter as a Judge in the manner outlined above. References to the Chief Justice in respect of constitutional matters under S 84 and other provisions (except under S 67 of the Constitution where he has a constitutional duty to appoint uneven number of judges) are usually done by the Judges voluntarily and at the discretion of the Judges in the Constitutional Judicial Review Division or by Judges in the Provinces and for good reasons, including the complexity of a matter and the need to have more than one Judge handle, the matters with extra ordinary public interest, where a matter need to be fast tracked for hearing on grounds of expedition or urgency, or Counsel representing the parties for any other good reason request the court that a matter be so referred and finally where the referring Judge for any other good reason and in his discretion makes an order for the reference. The same reasoning applies to judicial review references to the Chief Justice. In most of these cases the Chief Justice in turn executes his administrative jurisdiction to appoint Judges to hear the matters referred. The distinction of the two approaches is clear. The first as in this case results in a determination and the second is a process of allocation and appointment. The Chief Justice could as recommended above and in his absolute discretion hear the rank cases. This could provide the short time solution pending comprehensive constitutional reforms touching on the point. It is however clear to me that any reforms would have to vest the original jurisdiction in some court in the Hierachy. However since there must be a provision for appeal after the exercise of the original jurisdiction the “anomaly” might still persist.

It would in my view be a grave matter for the courts or Judges to insulate themselves against constitutional challenges since public law vindicates in a very special way the rule of law and provides an important pillar for safeguarding, securing and enforcing fundamental rights and freedoms. Providing for a way of applicants accessing the courts for this purpose can only enhance our system of justice and cannot possibly demean it! The task cannot also possibly be transferred to any other body except the courts because the courts must remain solely responsible for the lawfulness of what they do!

In the recent case of *KAMAU JOHN KINYANJUI v THE ATTORNEY GENERAL HCCC 1176 of 2004* the majority decision of Nyamu and Emukule JJ did reassert this jurisdiction and went on to adjudicate concerning a constitutional challenge pertaining to a two Judge criminal appeal. The Court fully endorsed the principle as set out in the case of *MAHARAJ v ATTORNEY GENERAL OF TRINIDAD & TOBAGO (No 2) [1978] 2 ALL ER 670* by the Privy Council overruling the Court of Appeal and wherein the special jurisdiction was explained in these words:

“(1) the claim for redress in the motion fell within the original jurisdiction of the High Court under S 6(2) of the Constitution (Similar to our S 84(2)). Since it involved an enquiry into whether the procedure adopted by the Judge before committing the appellant to prison had contravened the appellants rights under S 1(a) of the Constitution not to be deprived of liberty otherwise than by due process of law, and did not involve an appeal in fact or substantive law from the Judges decision that he was guilty of conduct amounting to contempt of court. Accordingly Scott J though of equal rank to the Judge who made the committal order had jurisdiction to entertain the motion. Moreover, the Attorney General was the proper respondent to the motion by virtue of S 19(2) of the State Liability and proceedings Act 1966 since the redress claimed under S 6 was against the state for contravention by its judicial arm of the appellants, constitutional rights ...”

S 84(1) of the Constitutional clearly states that the original jurisdiction is exercisable by the High Court without prejudice to any other action with respect to the same matter which is lawfully available.

It is only the High Court which is vested with the original jurisdiction to make the inquiry subject to the right of appeal to the Court of Appeal under S 84(7).

With the above in view it is quite clear to the court that his Lordship the Chief Justice did give to both parties an opportunity to argue the preliminary point. In other words he gave them the equality of hearing

or what is also being referred to as according the parties the right of equality of arms or giving them an adversarial hearing. It is significant to note that there is no challenge concerning the impropriety of the procedure followed in hearing the Preliminary objection before the Honourable the Chief Justice. It is also important to note that before the commencement of the hearing of the Preliminary Objection no objection was made to the Chief Justice hearing the matter. Instead the objection came after his ruling. It would be against the policy of the law to allow a party who has taken part in the proceedings to question the same proceedings on the ground that they should not have taken place and invoke the constitutional jurisdiction to challenge the outcome. The applicant is barred by the principles of acquiescence and waiver from mounting any such challenge. It would be contrary to the policy of law to allow relitigation of what has been competently heard save on appeal. The learned Counsel for the applicant has strongly argued that one cannot waive constitutional rights but in the circumstances of this case since the Chief Justice had determined that there were no constitutional issues following the hearing of a preliminary point and the applicant who was properly represented took part in the proceedings, I hold that acquiescence and waiver do apply. In the case of ***R v THE CHIEF JUSTICE & TRIBUNAL INBESTIGATING THE JUDGES Ex parte LADY JUSTICE NAMBUYE HC Misc 764/2004*** I held that waiver did apply in almost similar circumstances. In the NAMBUYE case the applicant had also taken part in the proceedings. I am of course not oblivious to the much wider principle that substantive fundamental rights cannot be waived e.g. the right to life and many of the chapter 5 rights and freedoms.

In the light of the above findings I decline to grant the declarations sought and further refuse the orders sought and as a result the application is dismissed with costs to the respondents.

DATED and delivered at Nairobi this 12th day of May 2006.

J.G. NYAMU

JUDGE