Waimiri v Muhoro & 2 others (Miscellaneous Civil Application E021 of 2023) [2025] KEHC 280 (KLR) (22 January 2025) (Ruling)

Neutral citation: [2025] KEHC 280 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

MISCELLANEOUS CIVIL APPLICATION E021 OF 2023

DKN MAGARE, J

JANUARY 22, 2025

BETWEEN

PETER MAINA WAIMIRI ..... APPLICANT

AND

JOSEPH NGUNJIRI MUHORO ..... 1ST RESPONDENT

GERALD MWANIKI ..... 2ND RESPONDENT

SAMUEL MURIUKI ..... 3RD RESPONDENT

RULING

1. When the chips fall, there is always a sacrificial lamb. At the end of the day, it is all in a day's work. This matter raises agonizingly disturbing issues that I did not expect in matters where parties are represented. Since 13.6.2023, the matter has been in court, with parties indicating they have a serious issue. I have painstakingly looked for the issue in vain. The Applicant filed an application dated 13.6.2023 seeking a record 10 orders. It was expressed to be brought under Order 42 rule 6 sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*.

2. The Applicant filed submissions stating that he has met the requisites for grant of stay pending appeal. He relied on the authorities of *Stanley Kang'ethe Kinyanjui v Tony Keter & 5 Others* [2013] eKLR and *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR. He also relied on another authority that cannot be verified from the Kenya law.

3. The 1st Respondent filed submissions dated 4.10.2024. He relied on the case of *Republic v David Makali & 3 others* (UR). Though I am aware of the Court of Appeal decisions on two aspects, contempt and final judgment for the recusal one is neither reported nor annexed. It is of little value to the court, not of itself but for failure to avail the decision.

Analysis

4. The matter was challenging a Ruling given on 19.4.2023 by Hon .M.M Gituma, where the court set aside ex parte judgment in Nyeri CMCC No. 146 of 2018. The court noted that there was no interlocutory judgment and as such a judgment was a nullity. My understanding of what constitutes a nullity, is as posited by Lord Denning while delivering the opinion of the Privy Council at page 1172 (1) in the case of *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1169:

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

5. Before I delve into the merit of the case, it is important to deal with the question of jurisdiction. This court acts only in scenarios where it has jurisdiction. The ruling was annexed to the affidavit in support. A question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Matters raised pertain to a decision of the court below exercising discretion to set aside ex-parte or interlocutory judgment as stated in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, where Justice Nyarangi JA, as he then was, stated as doth;

> " With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 *Act*. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what
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> I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics."

6. Jurisdiction, as I understand it, is conferred by statute or the *constitution*. Jurisdiction in all its facets must be present before the court handles a matter. This includes, jurisdiction ratione personae (personal), jurisdiction materiae, (subject matter) and jurisdiction ratione temporis (time); See *Nyanaro v Kanyankabaria* (Civil Appeal E52 of 2022) [2024] KEHC 2960 (KLR) (7 March 2024) (Judgment). There is no aspect of personal jurisdiction or jurisdiction ratione temporis invoked. The dispute is purely a subject matter dispute - jurisdiction materiae.

7. The subject matter is not in the normal aspect as to the cause of action. The matter was decided in the lower court. It was an exercise of discretion by the court below. To be able to set aside discretion, it

must be done within the appellate jurisdiction of the court. In the case of *Mbogo and Another v Shah* [1968] EA 93 the Court of Appeal stated that:

> " ...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

8. How then was the jurisdiction of this court invoked in respect of three issues: -

   a. Recusal

   b. Stay of proceedings

   c. Stay of execution.

9. The jurisdiction invoked herein is not appellate, is not original, exclusive or appellate. It is important to point out that any person aggrieved by a decision of the lower court is obligated to file a memorandum of appeal pursuant to Order 42 rule 1, which posits as follows:

> " Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.
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> (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively."

10. There is no Memorandum of Appeal filed in this matter. True, there is an annexture, but it is for a memorandum of appeal in respect to Civil Appeal No. E037 of 2023. That Appeal is not in issue in this case. To be able to get a stay, the matter must relate to the case appealed. In the current scenario, though the appeal was filed in Nyeri, the matter is in a different file. Order 42 rule 6(1) provides as follows:

> 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

11. This is not appeal from the decision of the court. It is not an application to extend time to appeal. It is a mongrel unknown in law. The court cannot exercise appellate jurisdiction outside an appeal. The Supreme Court guided on this in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR. The court stated as doth: -

> " This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant)*, Constitutional Application Number 2 of 2011. Where the *constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *constitution*. Where the *constitution* confers power

upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

12. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists. In this case, there is no indication where the court will get jurisdiction to deal with the case in the form it was brought to court. The court cannot on a miscellaneous application determine substantive issues of fact and law in a civil case. In *Rockland Kenya Limited v Commissioner General of the Kenya Revenue Authority & another* [2020] eKLR, W. A. Okwany stated as doth:

> " 12. Courts have taken the position that substantive orders cannot be issued in Miscellaneous Applications. This is the position that was adopted by Limo J. in *Witmore Investment Limited v County Government of Kirinyaga & 3 Others* [2016] eKLR wherein it was held:-
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> > " So where a party such as an applicant herein seeks an order that in effect appears to resolve with finality an issue in controversy or a contested issue, the application ceases to be interlocutory and it is a misconception to describe it as such. If the applicant wanted to move this court for a final resolution of the issues in controversy raised in the application, it should have moved this court properly in the manner provided by law."
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> 13. Similarly in *Nairobi West Hospital Limited V Joseph Kariha & Another* [2018] eKLR it was held:-
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> > ".....In my view this substantive order which for all intents and purposes cannot be issued through a miscellaneous application. A perusal of Order 3 Rule 1 of the *Civil Procedure Rules* will reveal hat suit may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be ametrophyic lateral scelorsis and still admitted in the Intensive Care Unit of the applicant's hospital is strenuously opposed"

13. The matter, not being an appeal, cannot be a basis for stay since this will be order in vacuo.

14. The defendant filed a replying affidavit dated 3.7.2023. The same deals with the merit of an appeal which is not before me. In substantive response the 1st respondent stated that the applicant is making surreptitious innuendos, which are based on conjecture, surmise and no evidence. Further, the Applicant had not dealt with the issue of recusal, and has not attempted to deal with recusal in the first instance. In *National Water Conservation & Pipeline Corporation v Runji & Partners Consulting Engineers & Planners Limited* [2021] eKLR, Mativo Jas he then was posited succinctly as hereunder:

> 66. A lawyer, according to *Black's Law Dictionary*, is "a person learned in the law; as an attorney, counsel or solicitor; a person licensed to practice law." The profession of law is called a noble profession. It does not remain noble merely by calling it as such unless there is a continued, corresponding and expected performance of a noble profession. Its nobility has to be preserved, protected and promoted. An individual or an institution cannot survive in his/its name or

on his/its past glory alone. The glory and greatness of an institution or an individual depends on his/its continued and meaningful performance with grace and dignity. The profession of law being noble and honorable one, it has to continue its meaningful, useful and purposeful performance inspired by and keeping in view the high and rich traditions consistent with its grace, dignity, utility and prestige.

15. In reaching the above philosophical decision the court relied on the decisions related to the degree of proof and standards required in a recusal application:

64. The Court of Appeal in *Republic v Mwalulu & Others* addressing the question of disqualification of a judge stated: -

> " i. When the courts are faced with such proceedings for disqualification of a judge, it is necessary to consider whether there is a reasonable ground for assuming the possibility of a bias and whether it is likely to produce in the minds of the public at large a reasonable doubt about the fairness of the administration of justice. The test is objective and the facts constituting bias must specifically be alleged and established.
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> ii. In such cases the court must carefully scrutinize the affidavits on either side, remembering that when some litigants lose their case they are unable or unwilling to see the correctness of the verdict and are apt to attribute that verdict to bias in the mind of the Judge, Magistrate or Tribunal.
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> iii. The court dealing with the issue of disqualification is not; indeed, it cannot, go into the question of whether the officer is or will actually be biased. All the court can do is to carefully examine the facts which are alleged to show bias and from those facts draw an inference, as any reasonable and fair-minded person would do, that the judge is biased or is likely to be biased.
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> iv. The single fact that a judge has sat on many cases involving one party cannot be sufficient reason for that judge to disqualify himself."

65. In *Kaplan & Stratton v Z Engineering Construction Limited & 2 Others* the court stated:

> " Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

16. It is also clear to state here that an application for recusal cannot be dealt with obliquely; decisions will continue to be made that tend to annoy or make parties feel wrong. The same was not dealt with by the court below. It cannot be dealt with by this court. The High Court cannot take up original jurisdiction in respect of proceedings in the lower court outside the provisions of Article 165(6) of the *constitution*. There is no allegation of illegality. It is purely a merit based challenge.

17. An appeal will not have even been useful as the question has not been dealt with by the court below. Further, a mere fact that a court misunderstood the law, or otherwise made an adverse ruling is not

a ground for recusal. The prayer that the trial court ceases handling the matter is thus untenable and accordingly dismissed.

18. There has been absolutely no basis laid for stay of proceedings. It was a red herring without much more. Pleadings must be clearly set out and reliefs sought on basis of evidence. Parties cannot throw prayers to the court and expect from pure philanthropy for the court to grant them. In the case of *M N M v D N M K & 13 others* [2017] eKLR, the court of Appeal (Waki, Makhandia & M'inoti, JJ.A.) held as follows: -

> Decisions abound from this Court that unequivocally declaim the power of a court to determine issues which the parties have not raised in their pleadings or otherwise by consent allowed the court to determine. For example in *Chalicha FCS Ltd v. Odhiambo & 9 Other*s [1987] KLR 182, the Court held that:
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> > " Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity."
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> Later in *Kenya Commercial Bank Ltd v. Sheikh Osman Mohammed,* CA No. 179 of 2010 the Court expressed itself thus:
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> > " It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff's claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear."
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> A court may validly determine an unpleaded issue where evidence is led by the parties and from the course followed at trial it appears that the unpleaded issue has been left to the court to decide (See *Odd Jobs v. Mubea* [1970] EA 476). However, that was clearly not the case in this appeal.

19. The reasons to recuse can only reside in the court. The High Court cannot forcefully recuse a lower court by fiat, without the court giving the lower court a chance to be heard or it is an appeal from the decision and the court is ordering a retrial.

Determination

a. The application is bare and baseless. It is accordingly dismissed with costs of 20,000/ = to the 1st Respondent.

b. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 22ND DAY OF JANUARY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for the Applicant

Mr. Nderi for the Respondents

Court Assistant – Jedidah