Republic Through Agot v Norman & 18 others (Miscellaneous Criminal Application 8 of 2024) [2024] KEHC 8797 (KLR) (23 July 2024) (Ruling)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

MISCELLANEOUS CRIMINAL APPLICATION 8 OF 2024

DR KAVEDZA, J

JULY 23, 2024

BETWEEN

REPUBLIC THROU' BRYSON MANGALA AGOT ..... PROSECUTOR

AND

MOSHE NORMAN & 18 OTHERS ..... RESPONDENT

RULING

I. Introduction

1. Jurisdiction is primordial in every suite. Jurisdiction is the foundation on which every suit should be founded on. It has to be there when the suit is filed in the first place. It has to be there when the suit is being considered and it has to be there when a Ruling or judgment is being delivered. When at any point in the consideration of a suit, the court determines that it does not have jurisdiction, it must drop its tools. The court cannot breathe life into a nullity when jurisdiction does not exist. With this introduction, this court moves to consider the application before it.

2. Vide an amended notice of motion dated 8th November 2022, the applicant seeks leave of this court to institute private proceedings against the respondents, jointly and severally. The said application has been brought under section 88 of the *Criminal Procedures Code* Cap 75 as read together with section 28 of the *Office of the Public Prosecutor Act 2013* and Sections 1A, 1B and 3A of the *Civil Procedure Act*.

3. The Applicant claims that cognizable offences have been committed and he seeks leave of this Court to institute private proceedings against the respondents on the following charges: forgery contrary to section 351 read together with section Sections 345 and 348 of the *Penal Code* Cap 63 of the Laws of Kenya, Theft Contrary to section 268 read together with section 273 and 275 of *Penal Code* Cap 63 of the Laws of Kenya and murder contrary to section 203 of *Penal Code* Cap 63 of the Laws of Kenya.

4. The application is opposed by the respondents vide grounds of opposition, replying affidavit and a preliminary objection. In summary, the Respondents contend that this court lacks jurisdiction to hear

and determine this matter. Secondly, the Notice of Motion is incompetent, frivolous and does not meet the threshold for the grant of the prayers sought. This is summary of the grounds evident in the 16th Respondent's grounds of opposition dated 18th September 2023, 4th respondent's preliminary objection dated 12th September 2021.

Submissions by the parties

5. The Applicant through his written submissions dated 16th March 2023 submits that this Honourable Court has jurisdiction to grant the orders sought. Further that the issue of jurisdiction was already determined by my brother Hon. Justice Justus Bwonwonga's ruling dated 16 May 2022 where while relying on Article 165(3)(a) of the Cok and the Court of Appeal's ruling in *Thomas Patrick Gilbert Cholmondeley* (2008) eKLR, the learned Judge held that a judge of the High Court hearing a case has jurisdiction to give permission for private prosecution for private prosecution requested under section 88 of the criminal procedure code. Further, the applicant submits that he has met the test for grant of the orders as laid down in the locus classicus case of *Floriculture International Limited and others* High court Misc Civ App No 114 of 1997.

6. The Respondents are of a contrary opinion. The 16th Respondent in its grounds of opposition insist that this Court does not have jurisdiction to consider an application for leave to institute proceeding. The 4th respondent in its submissions dated 25th October 2023 restricted the submissions on whether the applicant had met the test under section 88 of the *Criminal Procedure Code*. The 4th Respondent while relying on various authorities submitted that the applicant has not met the mandatory five tier test set out in the myriad of authorities including the *Floriculture Case* (*supra*).

II. Analysis and Determination

7. In my considered view, there are two issues for determination. First, whether this court has jurisdiction to consider the application and second whether the applicant has met the test to allow grant of the orders sought.

    i. Whether the Court has Jurisdiction to consider the Application

8. This Court being a creature of the *Constitution* and the law must only exercise the jurisdiction conferred on it. The Supreme Court has spoken to this issue in a number of decisions. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & Another the Court stated thus:

> " A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... 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..."

9. The locus classicus on matters jurisdiction is clear. The court in the celebrated case of *The Owners of the Motor Vessel 'Lillian S' –v- Caltex Oil (Kenya) Ltd* (1989) KLR 1 stated as follows:

> " '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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

10. The Applicant submits that the question of jurisdiction was already determined by the learned Judge and has annexed the ruling to the submissions. In simple terms, the applicant suggests that the question is closed. However, I don't think so. Jurisdiction being everything, a court of law must at all times satisfy itself that it has jurisdiction. This is because jurisdiction is central in a judicial proceeding and a court should not act in vain. Further, jurisdiction can be raised at any stage.

11. I, as a judge, sitting and presiding over a case must satisfy myself that I have jurisdiction to grant the orders. For what is the value of me issuing orders in a matter where it is found that I did not have jurisdiction to proceed? As the Court of Appeal cautioned in *Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others* (2013) eKLR that: -

> So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

12. Similarly in *Macfoy vs. United Africa Co. Ltd* [1961] 3 All ER. 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> "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." (emphasis mine).

13. In his ruling dated 16 May 2022, the Learned Judge found that this court has jurisdiction to consider the application before this court. The Ruling of the learned judge was primarily based on three grounds. First, a reading of section 88 of the CPC to hold the view that an application for leave to institute private prosecution must be filed at the magistrate court overlooks the 'vesture of unlimited original jurisdiction in criminal and civil matters in the High Court by the *Constitution* itself' and once a party invokes the original jurisdiction of the High Court , the provisions of article 165(3) of the *Constitution* kicks in. Second, a magistrate cannot grant leave to an applicant to institute charges which it has no jurisdiction to handle such as the charge of murder. Third, due to the unlimited original jurisdiction of the High Court, this court has jurisdiction to consider the application especially where the jurisdiction to try the charges is concurrent.

14. I have considered this analysis of the Learned Judge and I don't agree with the position taken by my brother for the following reasons: First, it is important to point out that it is an accepted principle

of construction of statutes that the Legislature does not make mistakes. It is presumed to know what it wants provided in the law it makes. The Ugandan Court of Appeal in *Hon. Gagawala Nelson G. Wambuzi vs. Kenneth Lubogo*, Election Petition Application No. 00100 of 2011 (Unreported) as cited with approval by the Court of Appeal in *Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission, IEBC & 8 others* [2013] eKLR and *Cornel Rasanga Amoth v William Odhiambo Oduol & 2 others*[2013] eKLR, the Court held that

> The legislature makes no mistakes when it legislates. It is presumed to know what it wants provided in the law it makes. The law must be interpreted as it is and not, as it may be considered by some, it ought to be.

15. It is not for a Court to interpret a legislation in a manner that completely alters the legislative intent of the enactment and a Court is not supposed to imply a meaning which was not contemplated by the legislature. This was the finding of the Court of Appeal in *County Government of Kiambu vs The Senate & Others* (2017) where the court stated: -

> " There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinary be taken as conclusive. Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete. The implication is that when the language is clear, then it is not necessary to be labor examining other rules of statutory interpretation."

16. I also wish to point an observation by the Court of Appeal on the role of Courts when interpreting a statute. The Court of Appeal in *County Government of Nyeri & Anor. vs. Cecilia Wangechi Ndungu* [2015] eKLR held that:

> " Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors."

17. It is my considered view that the port of call is the statute itself which must be read by construing the words used. In reliance with the above decision, Courts do not have unrestricted powers when construing a statute. The Court are subject to the rule of law and it is their obligation to construe a legislation but not to make it.

18. It is at this stage that I wish to reproduce section 88 of the *Criminal Procedure Code* in full:

> 88. Permission to conduct prosecution
>
> (1) A magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorized by the Director of Public Prosecutions in this behalf shall be entitled to do so without permission.

19. Section 88 of the *Criminal Procedure Act* has been interpreted variously by this Court before. The provision of section 88 empowers the magistrate to consider an application for leave to institute private prosecutions. No where in the provision allows this Honourable Court to consider such an application. The High Court in *Isaac Aluoch Polo Aluochier v Stephen Kalonzo Musyoka & 218 others* [2013] eKLR held that

> 21. The law required, and I believe still requires, that a party should approach the Magistrate's Court under the provisions of section 88 of the *Criminal Procedure Code* to permit him or her to carry out the prosecution. The Court has in various decisions in the past set out what is required for a party to be permitted to carry out a prosecution, which is now the constitutional responsibility of the ODPP and formerly, the AG.
>
> 28. In order not to pre-empt the decision of the Chief Magistrate in Makadara when he considers the application by the petitioner, I will say no more on this matter save to observe that in making his decision, in addition to considering the Floriculture principles, he must be guided by the constitutional injunction that requires that there should be fast and expeditious disposal of cases, and that there should not be an abuse of the court process by any party.

20. The Supreme Court *In the Matter of the Interim Independent Electoral Commission*, Constitutional Application Number 2 of 2011 held that a Court cannot expand its jurisdiction by way of craft or innovation and any decision made without the requisite jurisdiction is a nullity. The Court proceeded to hold that

> (30] The *Lillian 'S'* case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the *Constitution*.

21. Therefore, the High court cannot interpret section 88 of the *Criminal Procedure Act* to ignore the express wording of the provision. The *Criminal Procedure Code* does not grant the High court that jurisdiction. The determination of that question is left to the magistrate. In accordance to section 88 of the criminal procedure code relied on by the applicant, the appropriate court to determine that question is the magistrate court and not the high court. A court of law with all due respect cannot by way of craft or innovation grant itself a jurisdiction that it does not have. A court of law cannot exercise a power grab. Such an action cannot be sanctioned by the *Constitution*.

22. Second and more important, I do not agree with the interpretation of the learned Judge on the interpretation of article 165 of the *Constitution*. Whereas it is true that this Court has original jurisdiction in civil and criminal matters, it does not mean that this court should usurp jurisdiction granted to other institutions by law. Different courts have already interpreted this provision. The Court of Appeal in *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others* [2020] eKLR where the Court rendered itself though the judgment of Justice Makhandia JA that a party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated

disputes of law and fact at first instance. To this end, I reiterate and affirm the *dicta* in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed.

> [...] A Court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.A Court cannot arrogate itself an original jurisdiction simply because claims and prayers in a Petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode of conferment of jurisdiction to any Court or statutory body.'

23. The Court of Appeal is saying that original jurisdiction does not mean usurping the jurisdiction of another court. Secondly, a party cannot combine issues so as to give a superior court jurisdiction. In simpler terms, the applicant cannot combine various offences including murder and then come to this court. All the other offences are triable at the lower court and the mere inclusion of murder does not grant this court jurisdiction.

24. When the matter went to the Supreme Court, the Supreme Court of Kenya in Benson Ambuti *Adega & 2 others v Kibos Distillers Limited & 5 Others* [2020] eKLR, Petition 3 of 2020, Maraga, CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ. held as follows

> " 'It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues, but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised it discretion to hear and determine the Petition.'(51)Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.(52)The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the US Supreme Court in *Railroad Commission of Texas v Pullman Co,* 312 US 496 61 S. Ct. 643, 85 L Ed 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in *England v Louisiana State Board of Medical Examiners,* 375 US 411 (1964) also noted that a State Court determination would indeed bind the federal court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal court. If such a reservation is made, the parties can return to the federal court, even if the State Court makes a ruling on the issue.(53)Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then have determined the reserved issues, alongside any of the appealed

matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of the *Constitution* was protected. [54] The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial Court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate Court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void *ab initio*, and that the appellate Court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance,"

25. I have quoted the Supreme Court decision in extension to show that the high court cannot take the jurisdiction of the magistrate in the disguise of original jurisdiction. Through the doctrine of judicial abstention, this court should allow the magistrate to make a decision. The precedents from the Court of Appeal and Supreme Court are binding on this court. This court must stop and leave the magistrate court to exercise its jurisdiction.

Conclusion

26. There is no reason for me to proceed to consider the second issue of whether the orders sought should be granted. This is because the application is based on a faulty foundation with no legs to stand on; it is a complete nullity. Therefore, with such a faulty foundation, the entire house of cards must collapse without much ado.

27. The application is therefore dismissed for lack of jurisdiction.

RULING DATED AND DELIVERED VIRTUALLY THIS 23RD DAY OF JULY 2024

D. KAVEDZA

JUDGE

In the presence of:

Mr. Mangala for the Private Prosecutor

Mr. Mong'are for the Respondents

Njuguna Court Assistant