



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NUMBER 108 OF 2017

EDWARD R. OUKO.....APPLICANT

VERSUS

SPEAKER OF THE NATIONAL ASSEMBLY.....1ST RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY.....2ND RESPONDENT

THE NATIONAL ASSEMBLY.....3RD RESPONDENT.

THE ATTORNEY GENERAL.....4TH RESPONDENT

THE PRESIDENT

OF THE REPUBLIC OF KENYA.....5TH RESPONDENT

RULING

Introduction

1. By his Chamber Summons dated 8th March, 2017, the Applicant, **Edward R. Ouko**, the Auditor General, an independent office under Article 248(2)(b) of the Constitution moved this Court seeking leave to commence judicial review proceedings challenging the proceedings relating to a petition filed before the National Assembly.

2. When the matter was placed before me on 8th March, 2017, I certified the application urgent and appreciating the impact and magnitude of the orders which were being sought, I directed pursuant to the proviso to Order 53 rule 1 of the **Civil Procedure Rules** that the application be served for *inter partes* hearing and/or further orders on 9th March, 2017.

3. On 9th March 2017, the ex parte applicant was ready to argue the application but **Mr Bitta** who appeared for the 4th and 5th Respondent informed the Court that there was pending before the Constitutional and Human Rights Division of this Court Petition No. 62 of 2017 in which there was an application for conservatory orders which application was scheduled for hearing on 13th March, 2017 before **Chacha Mwita, J.** It was averred that in the said proceedings the applicant herein is the 1st interested party while the Respondents are the same and since the petition was filed earlier, it was the view of learned counsel that this application be consolidated with the petition since the ambit of a

Constitutional Petition is wider. He therefore sought that these proceedings be placed before **Mwita, J** for further directions.

4. **Mr Bitta's** position was supported by **Mr Mwendwa** who appeared on behalf of 1st, 2nd and 3rd Respondents who submitted that since the orders sought in both matters are similar and as he needed time to bring all the matters in issue before the Court, in an affidavit, the matter should be placed before **Mwita, J**.

5. The said position was however opposed by the ex parte applicant. According to his learned counsel, **Dr Otiende Amollo**, since the issue of consolidation could only arise after the grant of leave and as no order had been issued in the petition, there was no bar to this Court entertaining the application for leave and directions in the nature of stay. According to learned counsel the matters in issue in these proceedings are not the same as those the subject of the petition and hence cannot be addressed in the petition.

6. Since I was not seized of the Petition and as I was not in a position to determine whether the issues herein were the same as in the petition, I granted leave and directed that the matter be placed before **Mwita, J** on 13th March, 2017 for a determination as to whether the issues in this application are similar to those in the said petition. I also directed the applicant to file the substantive motion by the end of the day on 10th March, 2017. Similarly, the Respondents were directed to respond to the limb seeking stay by the end of the day on 10th March, 2017. I however made it clear that the parties ought to be prepared to deal with the said directions in the nature of stay on 13th March, 2017.

7. From the record, on 13th March, 2017, **Mwita, J** considered the matter and the submissions of the parties and found that as he could not force the parties, who were intent at prosecuting their causes separately, to consolidate the same, this matter be brought back before this Court to proceed with the same.

8. However when matter was called out before me, **Mr Mwendwa** applied for stay of these proceedings during the pendency of the proceedings in the Petition 62 of 2017 on the ground that the issues are similar and in order to avoid the two Divisions of the High Court arriving at different decisions on the matter. This oral application was hinged on section 6 of the **Civil Procedure Act** as read with Article 159 of the Constitution.

9. **Mr Munene**, who stood in for **Mr Bitta**, informed the Court that **Mr Bitta** did not intend to get embroiled in the contestation relating to the stay and would rather deal with the main motion. In other words he left the matter in the hands of the Court.

10. The applicant, through learned counsel, **Miss Leila Latif**, however opposed the oral application. According to her, the ex parte applicant herein is no longer a party to the said petition having been removed therefrom by the said Court. To her the issues which the ex parte applicant intends to pursue in these proceedings are not the same issues that the petitioner in Petition 62 of 2016 is pursuing. It was her submissions that the issues the subject of these proceedings cannot be adequately canvassed in the said petition.

Determination

11. I have considered the submissions made on behalf of the parties herein by their respective counsel.

12. The 1st, 2nd and 3rd Respondents' position is that in light of the proceedings in **High Court Nairobi Petition Number 62 of 2017 – Okiya Omtatah Okoiti vs. National Assembly of Kenya & Others**, these proceedings are *sub judice* pursuant to section 6 of the **Civil Procedure Act**. The said section provides as follows:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same

parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

13. *Sub judice*, strictly speaking is provided under section 6 of the **Civil Procedure Act** which in the preamble to the Act is “An Act of Parliament to make provision for procedure in civil courts”. It is, however, now well settled that judicial review applications are neither criminal nor civil in nature. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

14. In **Commissioner of Lands vs. Hotel Kunste Ltd** (supra) and **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** it was held that judicial review jurisdiction is a special jurisdiction which is neither civil nor criminal and the **Civil Procedure Act** does not apply since it is governed by sections 8 and 9 of the **Law Reform Act** being the substantive law and Order 53 of the **Civil Procedure Rules** being the procedural law. Therefore strictly speaking section 6 of the **Civil Procedure Act** does not apply to judicial review proceedings. See **Republic vs. Judicial Service Commission ex parte Pareno [2004] 1 KLR 203-209** and **Re: National Hospital Insurance Fund Act and Central Organisation of Trade Unions (Kenya) Nairobi HCMA No. 1747 of 2004 [2006] 1 EA 47.**

15. This, however, does not take away the Court’s inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the its process. Whereas *sub judice* may not, pursuant to section 6 aforesaid, be invoked in judicial review proceedings, the Court retains an inherent jurisdiction to make such orders as necessary for the ends of justice including termination of proceedings or stay of the same. One of the principles guiding the exercise of judicial authority as enunciated in Article 159(2)(b) of the Constitution is that justice delayed is justice denied. The effect of filing several proceedings seeking the same or substantially the same orders would be to delay the course of justice and the Court is constitutionally obliged to take actions that would expedite the disposal of matters before it including termination of unnecessary proceedings and staying multiple suits filed by the same partes seeking the same or substantially the same orders. Accordingly, the principle of *sub judice* may well be achieved by applying the constitutional principles.

16. By taking such action the Court would be invoking its inherent jurisdiction which is not a jurisdiction conferred by section 3A of the **Civil Procedure Act** as such but merely reserved thereunder. In **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743** it was held:

“It is trite law that an *ex parte* order can be set aside by the judge who gave it or by any other judge. The Civil Procedure Rules provide for this. Our Constitution does assume the existence of supportive Civil Procedure regime in so far as the same is not inconsistent with the Constitution. There is nothing inconsistent with the Constitution in the act or principle of setting aside of *ex parte* orders for good reasons. If an order obtained in a Constitutional application is incompetent or improperly obtained there cannot be any valid reason why the court would not have the jurisdiction to set it aside. Setting aside would be properly justified on grounds of doing justice and fair play and good administration of justice and therefore in furtherance of public policy...Where there is no specific provision to set aside the courts power or jurisdiction would spring from the inherent powers of the court. *Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called “inherent”. For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction*

is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner. The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside ex parte orders, which by their very nature are provisional. [Emphasis added].

17. Accordingly the Court may in proper cases invoke its inherent jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of its process and this may be done where the principles of *sub judice* would be applicable. As was held by the High Court of Uganda in **Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993:**

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

18. This then leads me to the issue whether the said principles apply to this case. For the doctrine to apply the following principles ought to be present:

(1). There must exist two or more suits filed consecutively.

(2). The matter in issue in the suits or proceedings must be directly and substantially the same.

(3). The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title.

(4). The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

19. There is no doubt that conditions (1) and (4) hereinabove are common in the two suits under consideration. With respect to condition (2) **Mr Mwendwa**, himself appreciated that the application ordinarily ought to have been made formally. He however took the risk of presenting his case orally. It must be noted that where a party raises an objection barring the Court from proceedings with a matter, the burden is upon that party to satisfy the Court that the conditions favourable to the grant of such orders do exist since the Court does not ordinarily bar a party from accessing the seat of justice without compelling reasons. It was therefore upon the 1st, 2nd and 3rd Respondents to place before this Court materials upon which the Court would be in a position to make a definite finding that in fact the issues in this application and in the said petition are similar or substantially the same. By choosing a short cut, the said respondents have squandered an opportunity to convince the Court based on procedurally admissible evidence that the issues in both causes are the same or are in substance the same.

20. This Court cannot be expected to call for a matter pending before a Court of concurrent jurisdiction as opposed to an inferior tribunal, peruse the same and in the secrecy of the chambers make a determination prejudicial to a party without affording the said party an opportunity of being heard on the same. To do so would amount to a violation of the principles of natural justice and that would amount to abetting an injustice. As has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst & Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

21. What the 1st, 2nd and 3rd Respondents attempted to do was to take a short cut. As this Court has severally advised, parties and their legal advisers ought to take seriously the wise counsel of the Court of Appeal in **James Njoro Kibutiri vs. Eliud Njau Kibutiri 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220** that the ingenious lawyers are advised that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. Similarly, in **Macharia vs. Wanyoike [1981] KLR 45**, the Court was of the view that, a pleading by way of the proposed short-cut method may or may not be an out of place is perhaps a worthwhile proposition for the rules making body on grounds of expedience or as a time-saving device; but experience has repeatedly shown that short-cuts invariably result in being more expensive and time-absorbing in the end and that it may be specifically argued that in relation to the precaution against delay, a short-cut may be accepted or applied to expedite but not to delay; but a short-cut in breach of a fundamental rule creating or occasioning remedial action cannot escape the stigma of 'delay'. Similarly, it was held in **Lehmann's (East Africa) Ltd vs. R Lehmann & Co. Ltd [1973] EA 167**, that short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision.

22. Apart from the foregoing condition (3) above stipulates that for *sub judice* to be upheld, it must be shown that the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title. In this case, it was contended which contention was not controverted that the ex parte applicant herein is no longer a party to the said petition having been removed from the said proceedings. Although it was alleged that the Petitioner in the said petition is litigating on behalf of the ex parte applicant herein, no evidence was adduced to support that position. I cannot therefore find that the said condition has been satisfied.

23. As the 1st, 2nd and 3rd Respondents have failed to satisfy conditions (2) and (3) the application seeking to stay these proceedings based on the *sub judice* principle must fail and the same is dismissed.

24. This Court is aware that the Court in the petition has granted the conservatory orders which the parties herein conceded are in the nature of stay pending the hearing and determination of the said petition. That decision is in the nature of a decision *in rem*. These are a class of orders or judgements which are said to bind the whole world as they determine the state of affairs rather than the rights of the parties before the Court. In this respect it was held in **Kamunyu and Others vs. Attorney General & Others [2007] 1 EA 116** that:

“In a suit seeking judgement *in rem*, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world.”

25. Therefore the mere fact that a person was neither a party to the cause in which the decision was made nor a party on whose behalf the same was instituted does not deprive it of the benefit of the said order as long as the same was a decision *in rem*. I further associate myself with the decision in **George William Kateregga vs. Commissioner for Land Registration & Others Kampala High Court Misc. Appl. No. 347 of 2013** in which the Court while citing the South African case of **Nicholas Francois Martemns & Others vs. South African National Parks, Case No. 0117**, expressed itself as follows:

“Therefore, in the instant case even if the parties other than the Applicant crafted a consent judgement over the suit land which was sanctioned by the court, it necessarily became a judgement of the court. The effect was that the Applicant would be bound by it notwithstanding that he was not privy to the consent agreement or suit; which renders the judgement in that case a judgement *in rem*. A judgement *in rem* invariably denotes the status or condition of the property and operates directly on the property itself. It is judgement that affects not only the thing but all persons interested in the thing; as opposed to judgement *in personam* which only imposes personal liability on the defendant.”

26. Similarly in **Japheth Nzila Muangi vs. Kenya Safari Lodges & Hotels Ltd [2008] eKLR** it was

held:

“It is trite law that ordinarily a judgement binds only the parties to it. This is known as *Judgement in personam*. A judgement may also be conclusive not only against the parties to it but also against all the world. This is known as a judgement *in rem*. This is a judgement which declares, defines or otherwise determines the status of a person or of a thing i.e. the *jural* relation of the person or thing to the world generally.”

27. I am also alive to the decision in **Pattni vs. Ali & Anor (Isle of Mann (Staff of Government Division) [2006] UKPC 51** in which reliance was sought from *Jowitt’s Dictionary of English Law* (2nd Edn.) p. 1025-6 to the effect that:

“A judgement *in rem* is an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is also declared by the adjudication...So a declaration of legitimacy is in effect a judgement *in rem*.”

28. In my considered view, the issue of the propriety of proceedings before the National Assembly during the pendency of legal proceedings challenging the same cannot be said to be restricted to the parties in petition 62 of 2017. Such a decision is a decision *in rem* which are defined as final judgements or orders or decrees of competent courts which confer or take away from any person any legal character, or to be entitled to any specific thing, not as against any specific person but absolutely. See **Koech vs. African Highlands and Produce Limited and Another [2006] 2 EA 148**.

29. Although the decision of a Court of concurrent jurisdiction is not binding, if the said decision reflects the true legal position there would be no basis for a divergent opinion. **Benjamin Cardozo’s**, in *‘The Nature of the Judicial Process’*, New Haven; Yale University Press (1921) p. 149 opines:

“In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”

30. The House of Lords similarly held in **R vs. Knuller (Publishing, Printing and Promotions) Ltd (1973) A.C 435** :

“It was decided by this House in *Shaw vs Director of Public Prosecution* [1962] A.C 220 that conspiracy to corrupt public morals is a crime known to the law of England...I dissented in *Shaw’s* case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice is no longer regarding previous decision of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act...I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament.”

31. I also associate myself with the decision of **Lord Wilberforce** in **Fitzleet Estates vs Cherry (1971) 1 WLR 1345**, where he expressed himself as follows:

“Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been

given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected ...[D]oubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it.”

32. Accordingly, a Court ought only to depart from its earlier findings, if there is a substantial cause and in exceptional circumstances. In this case to now purport to consider the issue whether the leave already granted herein ought to operate as a stay, in light of the conservatory orders in place, would place this Court at the risk of arriving at a diametrically opposed position to the said decision and hence render judicial proceedings a circus.

33. In the premises, for the purposes of expediting these proceedings in light of the provisions of Article 159(2)(b) of the Constitution, I direct that the leave granted herein shall operate as a stay of further proceedings of the entire Parliamentary proceedings seeking the removal of the applicant emanating from the petition of 13th February, 2017 by **Emmanuel Mwagambo Mwagonah** pending the hearing and determination of the substantive Motion herein or further orders of this Court.

34. The costs will be in the cause.

35. It is so ordered.

Dated at Nairobi this 14th day March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Munywa for Dr Otiende Amollo and Miss Leila Latif for the applicant.

Mr Njoroge for Mr Mwendwa for the 1st, 2nd and 3rd Respondents

Mr Munene for Mr Bitta for the 4th and 5th Respondents

CA Mwangi