



Bellevue Development Company Limited v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties) (Civil Suit 371 of 2016) [2017] KEHC 8344 (KLR) (Commercial and Tax) (3 May 2017) (Ruling)

Bellevue Development Company Limited v Francis Gikonyo & 7 others [2017] eKLR

Neutral citation: [2017] KEHC 8344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 371 OF 2016
FA OCHIENG, J
MAY 3, 2017**

BETWEEN

BELLEVUE DEVELOPMENT COMPANY LIMITED PETITIONER

AND

FRANCIS GIKONYO 1ST RESPONDENT

CHARLES KARIUKI 2ND RESPONDENT

PAUL MWANIKI GACHOKA 3RD RESPONDENT

VINAYAK BUILDERS LIMITED 4TH RESPONDENT

AND

KENYA COMMERCIAL BANK INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

JUDICIAL SERVICE COMMISSION INTERESTED PARTY

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS INTERESTED PARTY

RULING

1. This Ruling is on the Preliminary Objection raised by the respondents against the petition.
2. The respondents contend that the petition should not be permitted to go forward because its very prosecution would constitute a violation of the Judicial Immunity of the 1st and 2nd respondents.



3. In my considered view, the most logical way of commencing the Ruling is by reciting the reliefs sought in the petition; they are as follows;

- “ 1. A Declaration that the 1st and 2nd Respondents being members of the Judiciary acted in bad faith and unlawfully in rendering their Rulings on 18th March 2014, 08th April 2014 and 8th April 2016 respectively in High Court at Nairobi, Milimani Commercial & Admiralty Division, Civil Suit number 571 of 2011 (O.S) and to that extent are not clothed with the immunity granted under Article 160 (5).
2. A Declaration that the collectivity of the various Rulings by the 1st and 2nd Respondents breached the petitioner’s Right to have its dispute with the 4th Respondent determined by the application of law in a fair and public hearing before a Court.
3. A Declaration that the Final Award published by the 3rd Respondent on 17th December 2014 is illegal, null and void.
4. A Declaration that the 1st, 2nd, and 3rd Respondents’ actions breached petitioner’s right to equal protection and benefit of the law.
5. A Declaration that the 1st, 2nd, 3rd and 4th Respondents’ individual and collective actions effectively took away the petitioner’s property unlawfully thus breaching its rights under Article 40 of the Constitution of Kenya.
6. An Order for compensation.
7. An Order that costs of this petition be borne by the Respondents or such of them or otherwise as the court may deem fit”

4. The 1st and 2nd Respondents are Hon. Justice Francis Gikonyo and Hon. Mr. Justice Charles Kariuki, respectively. Both of them have been sued in their capacities as Judges of the High Court.

5. Secondly, the petition makes it clear that the foundation upon which the Judges have been sued is their respective Rulings, which they pronounced in the case *Bellevue Development Company Limited v Vinayak Builders Limited & Another*, Hccc No. 571 of 2010 (O.S).

6. Therefore, the suit against the Judges arises out of the Judicial Acts they were performing.

7. The petitioner declared, at the outset, that it was aware of the provisions of Article 160 (5) of the *Constitution*, which stipulates as follows;

“ A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function”.

8. Based on that provision, the respondents contend that the petition was incompetent, as it sought to question why and how Judges carried out their respective judicial functions.

9. According to the petitioner, it is only when a Judge acts lawfully and in good faith that he would enjoy constitutional immunity from being sued.

10. Therefore, the petitioner intends to demonstrate that the Judges did not act in good faith or lawfully.



11. In practical terms, when the court is called upon to determine whether or not a Judge had acted lawfully and in good faith, the court would have to analyse both the decision and the conduct of the Judge
12. In the case of *Peter Ng'ang'a Muiruri v Credit Bank Limited & 2 Others*, Civil Appeal No. 203 of 2006, the Court of Appeal noted that there was no Judge of the High Court who was superior to other Judges of the court, in terms of jurisdiction. Therefore,

“It would be a usurpation of power to push forward such an approach, and whatever decision emanates from a court regarding itself as a Constitutional Court, with powers of review over decisions of concurrent or superior jurisdiction such decision is at best a nullity”.
13. Both Judge Gikonyo and Judge Kariuki have jurisdictions concurrent to mine. It would therefore follow that if I purported to arrogate to myself the authority to review their decisions, the decision which I would make, would be a nullity.
14. In my considered view, the task of ascertaining whether or not a Judge of concurrent jurisdiction had acted in good faith or had acted lawfully, constitutes an evaluation which violates the Judicial Immunity conferred by the *Constitution*.
15. In the case of *G.B.M. Kariuki v Fred Kwasi Apaloo*, Civil appeal No. 122 of 1994, the Court of Appeal emphasized that;

“The respondent, a Judge, holding administrative office of Chief Justice, while executing his judicial duties in court or in execution of his administrative duties within the jurisdiction, enjoys absolute privilege from being sued civilly for his expressions either in writing or verbally”.
16. The privilege is not conditional, as suggested by the petitioner; it is absolute.
17. The learned Judges of Appeal quoted the following words of Lord Esher Mr in *Anderson v Gorrie* [1895] 1 QB 668, at page 671;

“To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a Judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office”.
18. The rationale for the Judicial Immunity is to be found in the need for judicial officers to make determinations without fear. I so hold because if a Judge was to be liable to being sued for rendering decisions, he would always be scared that whatever decision he makes, may lead to him being found liable if the decision was later challenged.
19. Yet, the whole world recognizes that Judges are not infallible. Indeed, it is for that very reason that the legal systems worldwide have structures for appeals.
20. And in many jurisdictions it is also recognized that the highest Court in the appellate structure, can make mistakes. Therefore, those courts have liberty to depart from their own precedents.
21. By setting up appellate structures or even by allowing the highest appellate courts to depart from precedents, does not encourage courts to make mistakes. It is simply a recognition of human fallibility.



22. In the case of *Garnett v Ferrand* [1824 - 1834] ALL.E.R 244, at page 246, Lord Tenderden C J pronounced himself thus;

“This freedom from action and question at the suit of an individual is given by the law to the Judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgement, as all who are to administer justice ought to be”.

23. I am not suggesting that the Judges sued in this case erred. I have no jurisdiction to superintend over any Judge of concurrent jurisdiction. Therefore, I cannot even start out on the journey of assessing or evaluating the decisions of the said Judges.

24. But even assuming that a Judge had erred when making a judicial determination, I would borrow the following words of Lord Denning MR in *Sirros v Moore & Others* [1974] 3 ALL E R 776, at page 785;

“Though the Judge was mistaken, yet he acted judicially and for that reason no action will lie against him”.

25. In effect, when a Judge was undertaking judicial functions, he was entitled to judicial immunity, even when he made mistakes.

26. I appreciate that there might be a world of difference between a genuine mistake and a dishonest act. But, as Lord Esher MR said in *Anderson v Gorrie* [1895] 1 Q.B 668, at page 670;

“...the question arises whether there can be an action against a Judge of a Court of Record for doing something within his jurisdiction, but doing it maliciously and contrary to good faith. By the common law of England it is the law that no such action will lie”.

27. Commenting on that holding Lord Bridge stated as follows in *Mc C v Mullan & Others* [1984] 3 ALL E R 908, at page 916;

“The principle underlying this rule is clear. If one Judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave the party without a remedy than that nine hundred and ninety-nine honest Judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction”.

28. Once again I reiterate that I have not found the Judges to have erred. I have no jurisdiction to make a finding concerning the correctness or otherwise of their decisions.

29. However, on the strength of the words Lord Bridge, no action could lie against the Judges even if they had acted dishonestly.

30. In conclusion, the petition is not sustainable. I uphold the Preliminary Objections, and hereby strike out the petition. The petitioner will pay costs to the respondents and the Interested parties.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MAY 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of



Muturi Mwangi for the Plaintiff

Wanga for the 1st Respondent

Wanga for the 2nd Respondent

Wanga for the 3rd Respondent

Wabuge for the 4th Respondent

Miss Mwika for Kiche for the 1st Interested Party

No appearance for the 2nd Interested Party

No appearance for the 3rd Interested Party

No appearance for the 4th Interested Party

Collins Odhiambo – Court clerk.

