



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Petition 84 of 2012**

**ROBERT MWANGI .....PETITIONER**

**VERSUS**

**SHEPHERD CATERING LIMITED .....1<sup>ST</sup> RESPONDENT**

**HON. LADY JUSTICE PAULINE NYAMWEYA .....2<sup>ND</sup> RESPONDENT**

**NAIROBI HOLDINGS LIMITED .....1<sup>ST</sup> INTERESTED PARTY**

**STEEL SONS LIMITED .....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

**Introduction**

1. The petitioner has come to this court seeking various orders relating to the conduct of proceedings in **High Court ELC No. 359 of 2004 Shepherd's Catering Limited –v- Nairobi Holdings Limited & 2 Others**. In his Chamber Summons application dated 16<sup>th</sup> March 2012 expressed to be brought under Articles 22 and 23 of the Constitution and Sections 1A, 1B and 3A of the Civil Procedure Rules as well as Rule 20 of the High Court (Practice and Procedure) Rules 2006, the petitioner seeks the following orders;

- (i) That for reasons to be recorded, service of this application be dispensed with and the same be heard ex parte in the first instance.**
- (ii) That pending the hearing and determination of this application inter parties or until further orders of this court there be a stay of any further proceedings in High Court Civil Suit No. 359 of 2004 and or execution of the orders of Hon. Justice Nyamweya issued on the 19th January 2012, 6th February 2012 and 15 February 2012.**
- (iii) That pending the hearing and determination of this petition or until further orders of this court there be a stay of any further proceedings in High Court Civil Suit No. 359 of 2004 and or execution of the orders of Hon. Justice Nyamweya issued on 19th January 2012 , 6th February 2012 and 15th February 2012.**
- (iv) That the Hon. the Chief Justice be pleased to constitute a bench of 3 judges of this Hon. Court excluding Hon. Justice Nyamweya and hear and determine this Petition.**
- (v) The costs of this application be provided.**

2. The application is supported by the petitioner's affidavit sworn on 16<sup>th</sup> March 2012.
3. In the petition of the same date as the Chamber Summons Application and also supported by an affidavit sworn by the petitioner on the 16<sup>th</sup> of March 2012, the petitioner seeks the following orders:
  - a) **A declaration that the respondents jointly and severally are in breach of the petitioner's constitutional fundamental rights and/ or freedoms**
  - b) **A declaration that in the totality of the circumstances, the 2<sup>nd</sup> respondent is not immuned (sic) from action or proceedings as contemplated by Article 160(5) of the constitution.**
  - c) **An order for enforcement of the orders of the Honourable Justice Mbogholi requiring the 1<sup>st</sup> respondent to immediately vacate the suit premises.**
  - d) **An order that in trial of any contempt of Court, the first in time be given priority**
  - e) **An order that any further hearing or proceedings in High Court Civil Case No 359 of 2004 do exclude the honourable lady Justice Nyamweya**
  - f) **The costs of this suit.**

4. The 2<sup>nd</sup> respondent filed grounds of opposition dated 30<sup>th</sup> April 2012 which are as follows:

1. **THAT** the 2<sup>nd</sup> respondent as a judge of the High Court has immunity from all actions and suits in the discharge of her judicial mandate under the provisions of Article 160(5) of the constitution.
2. **THAT** the constitutional Division of the High Court does not have jurisdiction to supervise a Judge of concurrent jurisdiction in any other Division under the provisions of Article 165(6) of the constitution by way of a Petition or otherwise.
3. **THAT** the petition amounts to an abuse of the court process as the petitioner's recourse in law is to file an appeal to the Court of Appeal if aggrieved by a decision of the 2<sup>nd</sup> respondent in HCCC No 359 of 2004 and not to lodge a collateral attack by way of a constitutional petition.

5. When the matter came up before me on the 26<sup>th</sup> of March 2012, I directed the parties to address me first on the issue of my jurisdiction to hear a matter arising out of a decision of another Judge of concurrent jurisdiction sitting in another Division of the High Court. This is the point that was argued before me on 26<sup>th</sup> of September 2012, and to which this ruling pertains.

## **Background**

6. The petition and the interlocutory application arise out of proceedings in **High Court ELC No. 359 of 2004 Shepherd's Catering Limited –v- Nairobi Holdings Limited & 2 Others**. Certain orders had been made in that matter which the 2<sup>nd</sup> Interested Party had failed to comply with, and Justice Pauline Nyamweya, the 2<sup>nd</sup> respondent, who was seized of the matter, ordered the petitioner and other directors of the 2<sup>nd</sup> Interested Party to appear before her and show cause why they should not be cited for contempt of court. The petitioner and the other directors alleged violation of their constitutional rights in an application filed under Rule 23 of the High Court (Practice and Procedure Rules) 2006 which Nyamweya J declined to entertain until the petitioner and his co-directors purged the contempt. It was at this stage that the petitioner filed this petition and the application now pending before the court.

## **Submissions**

7. Mr. Muite, Learned Senior Counsel, presented the position for the 2<sup>nd</sup> respondent. He submitted that

the issue before the court was whether this court has jurisdiction to hear this petition or entertain the application itself, bearing in mind that the petition stems from rulings delivered by Lady Justice Nyamweya in a case in the Land and Environment Division. He noted that the petitioner alleges that those orders are in violation of his rights and freedoms, but that the petition, the issues and the application emanate from a misconception that a constitutional issue can only be adjudicated upon by the constitutional court. He submitted further that the jurisdiction of a judge of the High Court, irrespective of his or her Division, emanates from Article 165 of the Constitution, and that the High Court Divisions are simply for administrative convenience. If a litigant wishes to argue a constitutional issue arising in any proceedings, that issue should be raised before that court, and to do otherwise is to place this court in the impossible position of sitting on appeal on the judgment of a court of concurrent jurisdiction.

8. Mr. Muite submitted further that if a party is dissatisfied with a decision or ruling before the High Court, then it should go to the Court of Appeal. By filing this petition and making the allegations in the petition, particularly paragraph 23 thereof, the petitioner was asking this court to adjudicate on the conduct of another judge of concurrent jurisdiction.

9. Mr. Muite referred to the case of **Peter Nganga Muiruri-v- Credit Bank Limited & 2 Others Court of Appeal Civil Appeal No. 203 of 2006** and submitted that all judges derive their authority from the Constitution, and if there had been any violation of any of the constitutional rights of the petitioner, such alleged violations should be raised before that court. Whether the alleged violation was on merit or procedural as argued by the petitioners, this court had no jurisdiction to entertain the matter. Mr. Muite submitted that the decision in **Hon. Martha Karua –v-Radio Africa HCCC No 288 of 2004** on which the petitioner was relying to support his claim that this court has jurisdiction, was determined by the High Court in 2006, two years before the Court of Appeal made its decision in **Peter Nganga Muiruri –v- Credit Bank Limited** (supra) in 2008), He urged the court to dismiss the petition and the application with costs to the respondents.

10. Learned Counsel Mr. Onindo for the 1<sup>st</sup> respondent associated himself with the submissions by Mr. Muite and urged the court to dismiss the application and the petition. Mr. Ojiambo for the 1<sup>st</sup> Interested Party indicated that he had no submissions to make on the question of jurisdiction.

11. The petitioner through his Learned Counsel Mr. Odera, submitted that this court has jurisdiction to entertain the application and the petition. He conceded that there is no Constitutional Court in Kenya as is the case in other jurisdictions such as South Africa and that a party cannot therefore move to such a court for redress of a violation of a right. He also conceded that jurisdiction for redress of constitutional violations rests in the High Court. He submitted, however, that the petitioner had invoked the constitutional jurisdiction of the High Court before the 2<sup>nd</sup> respondent on the 20<sup>th</sup> of February 2012 but the court had declined to hear him.

12. Mr. Odera submitted that Article 160(5) of the Constitution provides that a member of the judiciary is not liable for an act done in good faith, and therefore it cannot be argued that a judicial officer is not liable for an act done in bad faith. He contended that the 2<sup>nd</sup> respondent was not immune if her acts in the conduct of **ELC 359 of 2004** were actuated by malice, and that this court had jurisdiction to deal with a matter coming from another judge of concurrent jurisdiction provided it raises a constitutional issue. Learned Counsel relied for this argument on the case of **Hon. Martha Karua –v- Radio Africa** (Supra) and **Maharaj –v-A.G of Trinidad and Tobago (1979) A.C 385** and submitted that a judge in this Division can look at the procedural merits of a matter before another court.

13. According to Mr. Odera, this court has jurisdiction to inquire whether the other court of concurrent jurisdiction has followed the proper procedure or whether it violated the constitutional rights of the petitioner. He contended that the petitioner's argument was not that the Court had supervisory jurisdiction over other Divisions of the High Court. Rather, the High Court was exercising original jurisdiction, and in exercising this jurisdiction, which was conferred on it by Article 165 of the Constitution, the High Court can supervise even the Supreme Court and the Court of Appeal on matters of procedure.

14. With regard to the decision of the Court of Appeal in **Peter Nganga Muiruri –v- Credit Bank**

**Limited & Another** (supra) relied on by the 2<sup>nd</sup> respondent, Mr. Odera submitted that the Court of Appeal was wrong in arriving at that decision and urged the court to find that it has jurisdiction to hear this matter.

15. Mr. C.N. Kihara, Learned Counsel for the 1<sup>st</sup> Interested Party, supported the position taken by the petitioner. He submitted that constitutional issues had been raised in **ELC No. 359 of 2004** before the court seized of the matter but no decision was made. He argued that the respondents were now asking the court to stop the proceedings before inquiring whether this is the kind of situation in which a judicial officer has immunity and contended that there is no absolute bar in law or practice that any complaint of violation of a fundamental right by a judicial officer cannot be inquired into by another officer simply because they are of equal or superior rank. He asked the court to find that it has jurisdiction as it would be premature for the court to stop the petition at this stage.

### **Determination**

16. It is not in dispute that the petitioner is before this court because he was dissatisfied with a decision made by Nyamweya J in **High Court ELC No. 359 of 2004**. The Learned Judge had required that the petitioner and his co-directors purge their contempt of court by complying with certain orders of the court. Instead of complying with the orders in question, they filed an application alleging violation of their constitutional rights which they wished the Court to determine. The Court, however, ruled that it would not entertain their application with regard to the alleged violation of their rights until they purged the contempt.

17. What was the option open to the petitioner and his co-directors at that point? As Mr. Muite pointed out, the Court had made a ruling. Rightly or wrongly, it was a ruling of the Court. The option open to a party not satisfied with a decision of a Court is to appeal to a higher court. In this case, is the Constitutional and Human Rights Division the right forum for a party dissatisfied with a decision of a judge sitting in another Division of the High Court?

18. The jurisdiction conferred on the High Court is found in Article 165 of the Constitution. This Article provides as follows:

**165. (1) There is established the High Court, which—**

**(a) shall consist of the number of judges prescribed by an Act**

**of Parliament; and**

**(b) shall be organised and administered in the manner prescribed by an Act of Parliament.**

**2).....**

**(3) Subject to clause (5), the High Court shall have—**

**(a) unlimited original jurisdiction in criminal and civil matters;**

**(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;**

**(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**

**(d) jurisdiction to hear any question respecting the interpretation of this Constitution.....**

**(e) any other jurisdiction, original or appellate, conferred on it by legislation.**

(4) .....

(5) *The High Court shall not have jurisdiction in respect of matters—*

(a) *reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or*

(b) *falling within the jurisdiction of the courts contemplated in Article 162 (2).*

(6) *The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.*

19. The ‘*superior courts*’ referred to in Article 165(6) are defined in Article 162(1) as follows:

**162. (1) *The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).***

20. It is therefore made manifestly clear by the Constitution, from which judicial authority is derived, that the High Court has no jurisdiction to supervise the Supreme Court, the Court of Appeal, the Industrial Court or the Environment and Land Court established under Article 162(2) of the Constitution, or any Division of the High Court.

21. If I understand Mr. Odera correctly, his contention is that this Court as a Court in the Constitutional and Human Rights Division, in exercising the original jurisdiction conferred on the High Court under Article 165, can supervise even the Supreme Court and the Court of Appeal on matters of procedure. Even without reference to the existing judicial authorities on this point, this is not only an argument that flies in the face of clear constitutional provisions but is a totally fallacious argument that, taken to its logical conclusion, would lead to complete absurdities and reduce our judicial system into a comical farce.

22. The Constitution establishes a ‘*system of courts*’ to which it is clearly intended there should be logic and reason. Lower courts are bound by the decisions of higher courts in accordance with the doctrine of judicial precedents. Thus, the Supreme Court is granted appellate jurisdiction, under Article 163(3), as follows:

(b) *subject to clause (4) and (5), appellate jurisdiction to hear and determine appeals from—*

(i) *the Court of Appeal; and*

(ii) *any other court or tribunal as prescribed by national legislation.*

23. Article 163(7) provides that

**‘All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.’**

24. Article 164 establishes the Court of Appeal and vests in it jurisdiction in the following terms:

**164 (3) *The Court of Appeal has jurisdiction to hear appeals from—***

(a) *the High Court; and*

(b) *any other court or tribunal as prescribed by an Act of Parliament.*

25. If we were to follow the reasoning advanced by the petitioner, then the High Court would make a decision and a party dissatisfied with it would appeal to the Court of Appeal, and from there to the Supreme Court. The decision of the Supreme Court would be binding on the High Court under Article 163(7). However, should the Supreme Court or the Court of Appeal make an error in procedure, then,

following the reasoning advanced by the Petitioner in reliance on the decision in **Hon. Martha Karua – v- Radio Africa** (supra), a party could come back to the High Court’s Constitutional and Human Rights Division for relief. However, since original jurisdiction is vested by Article 165 in the **‘High Court’** not in a **‘Division’** of the High Court, then, on the convoluted logic advanced by the petitioner, **any** Division of the High Court can review a decision of any other Division of the High Court, of the Court of Appeal, and of the Supreme Court. A more absurd and chaotic scenario is hard to envision.

26. The thinking advanced by the petitioner is, in my view, precisely the reason why the Court of Appeal went to such lengths in the case of **Peter Nganga Muiruri-v- Credit Bank Limited** (supra) to correct the misconceptions then existing with regard to the jurisdiction of the Constitutional and Judicial Review Division, the precursor of today’s Constitutional and Human Rights Division. The Court of Appeal, after reviewing the decisions of Nyamu J, including the ones cited in **Hon. Martha Karua –v- Radio Africa** (Supra) then expressed itself as follows:

***‘We want to set the law straight on the jurisdiction of what the learned Judge called “the Constitutional Court”.***

***The part of the Constitution which deals with the establishment and jurisdiction of courts in Kenya is headed “The Judiciary”. Section 60 of the Constitution establishes the High Court with “unlimited original jurisdiction in Civil and Criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.” Although the Constitution stipulates that the jurisdiction of the High Court in criminal and civil matters is unlimited. it is circumscribed by rules of practice and procedure to enable the court to function side by side with courts and tribunals subordinate to it and to guide it in the manner of exercising its jurisdiction and powers.***

***Section 64 of the Constitution establishes the Court of Appeal with such “... jurisdiction and powers in relations to appeals from the High Court as may be conferred on it by law”. On the basis of this provision the Court of Appeal cannot directly entertain an appeal from any other court other than the High Court.***

***Sections 65 and 66 of the Constitution establish courts subordinate to the High Court which are Magistrates Courts and Kadhi Courts, and also Courts Martial. Each of those courts exercises such jurisdiction and powers as “may be conferred on it by law.”***

***There is no provision in the Constitution which establishes what Nyamu J. referred to as Constitutional Court. In Kenya we have a division of the High Court at Nairobi referred to as “Constitutional and Judicial Review” Division. It is not an independent Court but merely a division of the High Court. The wording of Section 67 of the Constitution which donates the power to the High Court to deal with questions of interpretation of sections of the Constitution or parts thereof does not talk about a Constitutional Court. Instead it talks about the High Court.***

***With regard to protective provisions Section 84 of the Constitution does not in any of its sub-sections talk about the Constitutional Court. Instead it talks about an application being made to the High Court.***

***In view of what we have stated above, it is quite clear that Nyamu J.’s remarks which we earlier reproduced were based on the mistaken belief that the Constitution had created a court called the Constitutional Court with supervisory powers over all other courts. The Hon. the Chief Justice must have been aware that no such Court is established under the Constitution and that, we think, would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole object of managing the cause list. The Chief Justice would have no jurisdiction to create a constitutional court as opposed to creating a division of the High Court.***

***Any single Judge of the High Court in this country has the jurisdiction and power to handle a constitutional question. The fact that a Constitutional Division was established did not by such***

**establishment create a court superior to a single Judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a court regarding itself as a Constitutional Court with powers of review over decisions of Judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them. As the late Nyarangi JA once remarked in the case of The Owners of the Motor Vessel “Lilians” vs Caltex Oil Kenya Ltd [1989]KLR I “Jurisdiction is everything. Without it, a court has no power to make one more step”.**

***To conclude on this aspect, it is our view and we hold that Nyamu J. raised and considered this issue to give him the opportunity of answering his critics and to popularize his view as to the scope and extent of the jurisdiction and powers of his division. The law is not on his side. If his views were to be allowed to gain currency we opine that confusion in the administration of justice will be engendered and disharmony will ensue among Judges of the High Court.***

***Moreover, if Nyamu J.’s views were to be accepted, it will create an absurd situation. Appeals from the High Court lie to this Court. If this Court’s decisions will be subject to a review by the so called “Constitutional Court”, an appeal from that court will lie to this Court for a second time, and if any of the parties feels any of his fundamental rights has been violated by this Court he will have recourse to the “Constitutional Court” whose decision thereon will be appealable to this Court. There will be no end to litigation.’ (Emphasis mine)***

27. I do not know how often and for how long this has to be repeated: that the Constitutional and Human Rights Division of the High Court is just an administrative Division of the High Court, with the same powers and jurisdiction as all the other Divisions of the High Court. As Justice Lenaola recently stated in the case of **Philip Kipchirchir Moi -v- Attorney General & Another Petition No. 65 of 2012** at paragraph 15:

***‘.....I must begin by dispelling the fallacy that the Constitutional and Human Rights Division of the High Court in Nairobi has jurisdiction to superintend, supervise, direct, guide, shepherd and/or purport to mend the mistakes, real or perceived, of other Divisions of the High Court in Nairobi or elsewhere in Kenya. In spite of the continued and consistent stand of judges of that Division that it cannot have been the intention of the framers of the Constitution that such a position should exist, parties in every conceivable case, continue to invoke that fallacious and misguided jurisdiction.***  
(Emphasis Mine)

28. After setting out the provisions of Article 165 which I have set out above, Justice Lenaola went on to state at paragraph 18 of his ruling as follows:

***‘Nowhere is there mention of the “Constitutional Court” in the above Article or indeed in the whole Constitution. Neither is there mention of a superior Division of the High Court called the “Constitutional and Human Rights Division,” with wide powers over other Divisions or Stations of the High Court.’***

29. This message must be brought home to litigants, and the duty to do this lies with their legal counsel. If a party is dissatisfied with a decision or conduct of a judge sitting in any Division or station of the High Court, and alleges that there has been a violation of his or her constitutional rights, the alleged violation must be raised before the judge of the High Court seized of the matter. If the party is still not happy with the decision of that Court, then his or her remedy lies in the Court of Appeal, and from there, the Supreme Court, as provided in the Constitution and the relevant legislation. These are the Courts in our system of courts to which appellate jurisdiction is vested.

30. A judge sitting in the Constitutional and Human Rights Division has the same jurisdiction as any other judge sitting in any other Division of the High Court. To ask such a judge to adjudicate in a matter that is before another judge of the High Court is to ask the judge to act in a matter that he or she has no jurisdiction over, and for the judge to do that is to engage in a nullity. As Justice Nyarangi so succinctly put it in **The Owners of the Motor Vessel “Lilians”vs Caltex Oil Kenya Ltd [1989] KLR I**

***“Jurisdiction is everything. Without it, a court has no power to make one more step”.***

31. I think I need say no more in this matter save that I will not engage in a nullity and purport to supervise the functioning and conduct or decision making by a court of competent and concurrent jurisdiction. The petitioner’s application and the entire petition is an abuse of the court process and is hereby struck out with costs to the respondents.

**Dated Delivered and Signed at Nairobi this 11<sup>th</sup> day of October 2012**

**MUMBI NGUGI  
JUDGE**

Ruling delivered in open court in the presence of  
Court Clerk – Kazungu

Ms Ndiho for the 3<sup>rd</sup> Respondent and holding brief for Mr. Odera Obar for the Petitioner

Mr. Onindo for the 1<sup>st</sup> Respondent

Mr. Wilson holding brief for Mr. Kihara for the 2<sup>nd</sup> Interested Party

No appearance for the 2<sup>nd</sup> Respondent

**MUMBI NGUGI  
JUDGE**