



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Gachuhi, Gicheru & Cockar JJ A)**

**CIVIL APPLICATION NO NAI 23 OF 1993 (UR 12/93)**

**MADHUPAPER INTERNATIONAL LTD..... APPLICANT**

**VERSUS**

**ATTORNEY GENERAL & 5 OTHERS..... RESPONDENT**

**RULING**

The applicant by its originating motion applied to the High Court for declaratory orders within the meaning of section 82 of the Constitution; an order for injunction; and for the award of damages against the State. The motion was supported by a lengthy and detailed affidavit of the applicant's Executive Chairman. The motion was set down for hearing before Dugdale J. Before the actual hearing, the applicant filed an application in which it prayed that the learned judge disqualifies himself from hearing the motion on the ground that the trial court would favour the State at the expense of the applicant as the Court had done previously. In all constitutional suits which went before Dugdale, J it was the State that won. The application was dismissed. The dismissal was followed by an application for leave to appeal. The same was also dismissed on the ground that there was no right of appeal provided for by section 84 of the Constitution after the final judgment of the High Court and that the order of dismissal was a final determination by the High Court. Hence this application under rule 5 (2) (b) for stay of the proceedings in High Court and for leave to appeal under rule 39 (b) of the Rules of this Court.

The respondent filed a notice of preliminary objection pointing out that the Court of Appeal has no jurisdiction to hear an application from a decision of the High Court given in the exercise of its jurisdiction under section 84 of the Constitution irrespective of whether such decision is final or interlocutory and that the order made on 15th February 1993 was a final order.

Before the hearing of the motion, the advocate for applicant gave notice to the Deputy Registrar of this court and copied to it to the respondents in which he stated:

“In the course of preparing for hearing of the above mentioned application, the undersigned, the counsel for the applicant, has come across two decisions of this honourable Court, namely *Commissioner of Income Tax v Ramesh K Menon*, Court of Appeal at Nairobi, Civil Appeal No 19 of 1981 and *The Commissioner of Lands v Meshaw Jacobs* Kenya Court of Appeal, Civil Appeal No 109 of 1987, which fundamentally undermine the authority of *Anarita Karimi Njeru v Republic No 2* [1979] KLR 162 on which the respondents intended preliminary objection is based. In the circumstances, at the hearing of the above application tomorrow the undersigned will invite the Court to apply *Dodhia v National & Grindlays Bank Ltd and Another* [1970] EA 195 at page

199 letter 1 and hold that the *Njeru* case was wrongly decided and that a right of appeal lies to this Court from all determinations made under section 84 of the Kenya Constitution.

The undersigned is aware of the difficulties there are in setting up a full Bench, a Bench of five judges, and will be happy to argue the point before a Bench of three judges tomorrow. However in discharge of his professional obligation as laid down in the *Commissioner for Lands v Sheikh Mohamed Bashir* [1958] EA 45 at page 50 letter B, he is requesting that if it is possible a Bench of five judges be set up.

At page 11 of his judgment in *Commissioner of Income Tax v Ramesh K Menon, supra*, the late Madan JA (as he then was) said,

Some day either the Legislature will ponder the issue or a full Bench will grapple with it. That “some day” can be tomorrow”.

Mr Kamau Kuria repeated the content of his letter that *Anarita Karimi Njeru v R No 2* [1979] KLR 162 was wrongly decided and that the court should depart from it. In order to depart from this judgment, he relied on the *Commssioner for Lands v Sheikh Mohamed Bashir* [1958] E A 45 at page 50 Letter B to E and the judgment of Madan J A (as he then was) in the *Commissioner of Income Tax vs Ramesh K Menon* C A 19 of 1983 (unreported) and *Dodhia v National Grindlays Bank Ltd and Another* [1970] EA 195.

Mr Inamdar for the respondent submitted that he was going to rely on his notice of preliminary objection and support *Anarita* but, after having read the authorities referred to by Mr Kamau in his letter, he now felt that however injurious the delay will be to his client the proceedings in the superior court having been adjourned indefinitely pending the determination of this application, he was obliged to support the application for a Bench of five judges to be convened.

Having considered the submissions made to us and the authorities cited, we find that the point now raised is of considerable public interest and it calls for an urgent thorough research and submission. We note that the predecessor of this Court was faced with the same situation when the court was requested to depart from its previous judgment in *Dodhia v National Grindlays Bank Ltd* when a Bench of five judges was called for. The Court held that since it was the final Court, appeals to the Privy Council having stopped, it was entitled to depart from its previous judgment in the interest of justice. We therefore call upon the Chief Justice, as a matter of urgency, to convene a Bench of five judges or as he may deem fit to hear this application and come up with a binding decision.

Costs on this preliminary point to be costs in the application

Dated and Delivered at Nairobi this 7<sup>th</sup> day of April, 1993

**J.M. GACHUHI**

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**JUDGE OF APPEAL**

**J.E. GICHERU**

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**JUDGE OF APPEAL**

**A.M COCKAR**

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**JUDGE OF APPEAL**