Attorney General v Bala (Civil Appeal 223 of 2017) [2023] KECA 117 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 117 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 223 OF 2017

HM OKWENGU, HA OMONDI & JM MATIVO, JJA

FEBRUARY 3, 2023

BETWEEN

ATTORNEY GENERAL .... APPELLANT

AND

GEORGE BALA .... RESPONDENT

(An Appeal from the Judgement and order of the High Court of Kenya at Nairobi (Odunga, J.) dated 23rd January, 2017 in Nairobi Constitutional Petition No. 238 of 2016)

No appeal can lie against a mere finding of the trial court that did not conclusively determine a dispute.

The appeal arose from the issuance of Executive Order No. 2/2013 by detailing the organization of the Government which assigned to the Attorney General a role in the functions of Council of Legal Education. The High Court issued among other orders; a declaration that whereas the Attorney General was a member of the Cabinet, he was not a cabinet secretary and therefore could not perform or purport to perform the functions specifically reserved for a cabinet secretary under any legislation. The instant court noted that from a perusal of section 66 of the Civil Procedure Act, an appeal lay to the Court of Appeal from decrees or any part of decrees and from the orders of the High Court. The court further held that no appeal could lie against a mere finding for the simple reason that the Civil Procedure Act and the Civil Procedure Rules did not provide for any such appeal.

Reported by Kakai Toili

Civil Practice and Procedure *- appeals - appeals from the High Court to the Court of Appeal - whether an appeal could lie against a mere finding of the High Court that did not conclusively determine an issue - , Cap 21, sections 2 and 66; Civil Procedure Rules, 2010, Order 43, rule 1.*

Constitutional Law *- fundamental rights and freedoms - right to appeal - who were the parties entitled to present an appeal against the decision of a trial court.*

Constitutional Law *- constitutional reliefs - declaratory reliefs - nature of declaratory reliefs - what were the conditions for issuing declaratory reliefs.*

Brief facts

The respondent sued the appellant at the High Court claiming that the President issued Executive Order No. 2/2013 detailing the organization of the Government and assigning responsibilities to cabinet secretaries and assigned to the Attorney General a role in the functions of Council of Legal Education, a body corporate established under section 3 of the . The respondent's complaint was that the only mentioned a cabinet secretary with defined functions but it did not mention the Attorney General. The respondent also contended that the Attorney General had performed functions under the Act, yet he was not a cabinet secretary nor did the (the Constitution) envisage him to be a cabinet secretary. The respondent's contestation was that the Executive Order offended the .

The High Court issued among others order; a declaration that whereas the appellant was a member of the Cabinet, he was not a cabinet secretary and therefore could not, where to do so would be contrary to an Act of Parliament, perform or purport to perform the functions specifically reserved for a cabinet secretary under any piece of legislation. Aggrieved, the appellant filed the instant appeal on among other grounds; that the High Court erred in law in finding that the appellant could not undertake functions assigned to him by statute on the erroneous premise that the same were an exclusive constitutional function of cabinet secretaries in the absence of specific conferment of functions to cabinet secretaries by thereby arriving at a wrong decision.

Issues

- i. Whether an appeal could lie against a mere finding of the High Court, which did not conclusively determine a dispute between the parties, to the Court of appeal.
- ii. Who were the parties entitled to present an appeal against the decision of a trial court?
- iii. What was the nature and conditions for issuing declaratory reliefs?

Held

1. Section 66 of the provided for appeals to the court from the High Court. A careful perusal of section 66 showed that an appeal lay to the Court of Appeal from decrees or any part of decrees and from the orders of the High Court. Decree as defined in section 2 of the meant the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determined the rights of the parties with regard to all or any of the matters in controversy in the suit and could be either preliminary or final. The two paragraphs the appellant was unhappy with did not conclusively determine the dispute, going by the definition of a decree, the two could not be decrees to be appealed against.

2. Section 2 of the defined an order as meaning the formal expression of any decision of a court which was not a decree, and included a rule *nisi*. The two paragraphs could not qualify to be orders to be appealed against.

3. The right to appeal was a creature of statute and an appeal could be presented, only;

1. by a party in the suit if he was aggrieved by the judgment; or
2. by a person who was not a party but who was aggrieved by the judgment if he sought and got leave of the court to prefer an appeal against the judgment. Unless a right of appeal was clearly and expressly given by statute, it did not exist. Whereas a litigant had a right to institute any suit of a civil nature in some court or another, no right of appeal could be given except by express words. In other words, a right of appeal inferred in no one and therefore an appeal for its maintainability must have the clear authority of law. The right of appeal, which was a statutory right, could be conditional or qualified. If the statute did not create any right of appeal, no appeal could be filed.

4. What was legislatively not permitted could not be read by implication, not in respect of right of appeal, as it was a creature of statute. An appeal was the right of entering a superior court invoking its aid and interposition to redress an error of the court below. The central idea behind filing of an appeal revolved around the right as contradistinguished from the procedure laid down therefor. A suit for its maintainability required no authority of law and it was enough that no statute barred the suit. But the position in regard to appeals was quite the opposite. The right of appeal inhered in no one and therefore an appeal for its maintainability must have the clear authority of law. That explained why the right of appeal was described as a creature of statute.

5. Under the and the Civil Procedure Rules made thereunder, an appeal lay only as against a decree or as against an order passed under rules from which an appeal was expressly allowed by order 43, rule 1 of the Civil Procedure Rules. The first sentence in the two paragraphs the appellant cited were mere findings by the High Court. The last sentences were his views. No appeal could lie against a mere finding for the simple reason that the and the Civil Procedure Rules did not provide for any such appeal.

6. From the grounds of appeal, either the appellant did not understand the nature of the declaratory reliefs issued by the court or misconstrued the entire judgment and principally drew the grounds of appeal directed at the High Court's reasoning in the body of the judgment and forgot that the appeal lay against the decree which was the final order of the court and was therefore appealable to the court. The appeal presented a unique scenario where the appellant seemed to be unhappy with the High Court's reasoning and opted to overturn the reasoning as opposed to the final orders. An appeal only lay against the final decree/orders.

7. Had the appellant properly understood the final decree, he would have appreciated that the High Court simply issued declarations clarifying the law. A declaratory order meant a ruling that was explanatory in purpose; it was designed to clarify what before was uncertain or doubtful. A declaratory order constituted a declaration of rights between parties to a dispute and was binding as to both present and future rights. Declaratory judgments were typically sought as a means of preventing a dispute by removing legal uncertainty as to the applicable law and the rights and obligations of the parties.

8. A declaratory judgment was very limited in its powers. All it could do was clarify a legal relationship or state of affairs by stating the court's opinion of it. In other words, it stated the court's authoritative opinion regarding the exact nature of the legal matter without requiring the parties to do anything. It was also important to bear in mind the requirements that were required at law for the satisfaction of the court before it could grant a declaratory relief. The conditions for issuing declaratory reliefs were:

1. The court had to have jurisdiction and power to award the remedy.
2. The matter had to be justiciable in the court.
3. As a declaration was a discretionary remedy, it had to be justified by the circumstances of the case.
4. The plaintiff had to have *locus standi* to bring the suit and there had to be a real controversy for the court to resolve.
5. Any person whose interests might be affected by the declaration should be before the court.
6. There had to be some ambiguity about the issue in respect of which the declaration was asked for so that the court's determination would have the effects of laying such doubts to rest.

9. The tests for granting declaratory reliefs were met and therefore the orders were properly issued. From a reading of the orders issued by the High Court, the High Court simply declared the law.

Appeal dismissed.

Orders

No orders as to costs.

Citations

Cases

1. Council of County Governors v Inspector General of National Police Service & 3 others ([2015] eKLR) — Explained
2. Dr. Timothy M. Njoya and 6 others v Honourable Attorney General and Another ([2004] eKLR) — Explained
3. Durban City Council v Association of Building Societies (1942 AD 27 at 32) — Explained
4. in the matter of Smt. Ganga Bai v Vijay Kumar and Others (1974 AIR 1126, 1974 SCR (3) 882) — Explained
5. Sahadu Gangaram Bhagade v Collector ([1970] 1 SCC 685) — Explained
6. State of Andhra Pradesh and others v B. Ranga Reddy (D) by LRs and Others (Civil Appeal No. 17486 of 2017) — Explained

7. Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and Another ([2006] 1 SLR (R) 112) — Explained

Statutes

1. Civil Procedure Act — Section 2, 66 — Interpreted
2. Constitution of Kenya, 2010 — Article 3(1); 23; 130(1); 131; 132(3)(b)(c); 152(1); 156(4)(c) — Interpreted
3. Interpretation And General Provisions Act — Section 3 — Interpreted
4. Legal Education Act — Section 3, 4(5) — Interpreted

Texts

1. HWR Wade, Administrative Law (5th Edition, pp.523)

Advocates

None mentioned

JUDGMENT

1. In order to properly appreciate the issues presented in this appeal, a succinct account of the factual background to this appeal is necessary. By a constitutional petition dated June 9, 2016 filed in the High Court at Nairobi, the respondent herein sued the appellant claiming that on May 20, 2013 the President of the Republic of Kenya pursuant to articles 131 and 132 of the *Constitution* issued Executive Order No 2/2013 detailing the organization of the Government and assigning responsibilities to Cabinet Secretaries and assigned to the Attorney General a role in the functions of Council of Legal Education, a body corporate established under section 3 of the *Legal Education Act*. His complaint was that the *Legal Education Act* only mentions a Cabinet Secretary with defined functions but it does not mention the Attorney General.

2. The respondent also contended that the Attorney General had performed functions under the said Act, yet he is not a Cabinet Secretary nor does the *Constitution* envisage him to be a Cabinet Secretary. His contestation was that the said Executive Order offends the *Constitution* to the extent it confers upon the appellant powers and functions of a Cabinet Secretary because the appellant can only perform other functions contemplated under article 156(4)(c) of the *Constitution*. Lastly, the respondent stated that the High Court in Petition No 425 of 2015 declared that the members of the Council of Legal Education were in office illegally so the appellant was unconstitutionally exercising the functions of a Cabinet Secretary by purporting to constitute the council. As a consequence of the foregoing, the respondent sought the following reliefs against the appellant:

    a) A declaration that the respondent is not a Cabinet Secretary and therefore cannot perform or purport to perform the functions specifically reserved for a Cabinet Secretary under any piece of legislation

    b) A declaration that the respondent's purported exercise of Cabinet Secretarial functions under the *Legal Education Act*, No 27 of 2012 or under any other piece of legislation is contrary to the *Constitution*, invalid, null and void.

    c) A declaration that the Executive Order No 2/2013 or any other Executive Order in so far as it purports to assign the respondent Cabinet Secretarial functions and powers is contrary to the *Constitution*, invalid, null and void.

    d) An order of judicial review in the nature of certiorari bringing before this court for the purposes of being quashed the portions of the Executive Order No

2/2013 that purports to assign the respondent Cabinet Secretary powers and functions.

e) Costs.

3. The High Court (Odunga J as he then was) in the impugned judgment dated January 23, 2017, issued the following orders:

a) A declaration that whereas the respondent the Attorney General, is a member of the Cabinet, he is not a Cabinet Secretary and therefore cannot, where to do so would be contrary to an Act of Parliament, perform or purport to perform the functions specifically reserved for a Cabinet Secretary under any piece of legislation.

b) A declaration that the respondent's purported exercise of Cabinet Secretarial functions under the *Legal Education Act*, 27 of 2012 or under any other piece of legislation, where the same is inconsistent with or contrary to the spirit of Constitution or the law in null and void.

c) A declaration that before performing Cabinet Secretarial duties, where permitted by the *Constitution* and the law, the Attorney General must take the oath appropriate to Cabinet Secretaries.

d) A declaration that the Attorney General, while performing the duties of a Cabinet Secretary is subject to the process of removal from that position of a Cabinet Secretary.

e) A declaration that any executive order that purports to assign the respondent, the Attorney General, cabinet secretarial functions and powers contrary to the letter and spirit of the *Constitution* and the law, is invalid, null and void.

f) I, however, appreciate that the effect of immediate invalidity of the appointment of the respondent as a Cabinet Secretary may not uphold public interest. In the circumstances and pursuant to article 23 of the *Constitution* I declare that this decision will only affect future actions of the respondent and the declaration of unconstitutionality of the Cabinet Secretarial functions of the respondent will be suspended for a period of three months to enable the executive take appropriate remedial action.

g) As this is public interest litigation there will be no order as to costs. I however commend the petitioner for taking the bold step as required of him by article 3(1) of the *Constitution* to protect and uphold the *Constitution*.

4. It is this judgment/decree the appellant seeks to set aside citing the following grounds:

a) That the honourable judgeerred in law by making a finding to the effect that the *Constitution* sets out the specific duties of Cabinet Secretaries thereby precluding other persons from performing such specific functions.

b) That the honourable judgeerred in law by failing to appreciate that it is the President who has the Constitutional prerogative to direct and co-ordinate the functions of ministries and government departments including assigning responsibilities to Cabinet Secretaries.

c) That the honourable judgeerred in law in failing to appreciate that the *Constitution* specifically provided for the Attorney General to perform any other functions conferred on the office by an Act of Parliament or by the President including the *Legal Education Act* as read together with the Interpretations and General Provisions Act thereby arriving at a wrong decision.

d) That the honourable judgeerred in law in finding that the Attorney General cannot undertake functions assigned to him by statute on the erroneous premise that the same were an exclusive constitutional function of Cabinet Secretaries in the absence of specific conferment of functions to Cabinet Secretaries by the *Constitution* thereby arriving at a wrong decision.

e) That the honourable judgeerred in law by failing to appreciate that Parliament allowed the Attorney General to perform functions that Parliament in other instances had assigned Cabinet Secretaries pursuant to the provisions of article 156 of the *Constitution* and the exclusive constitutional mandate of Parliament to legislate.

f) That the honourable judgeerred in law in construing section 3 of the Interpretation of General Provisions Act to be a deeming clause and relegating it to a lesser status than other statutory provisions thereby arriving at a wrong decision.

g) That the honourable judgeerred in law by elevating matters of statutory construction to constitutional question of interpretation thereby arriving at a wrong decision.

h) That the honourable judgegenerally made an error of law by failing to correctly identify and interpret the matter before him.

5. Despite being served, the respondent did not attend the hearing nor did he file submissions.

6. Mr. Bitta, representing the appellant adopted his written submissions dated November 17, 2017 which he highlighted orally in court. The cornerstone of his submissions was that the issue before the court was merely statutory interpretation as opposed to constitutional questions. He argued that articles 130 (1) and 152 (1) of the *Constitution* defines the composition of the executive and the Cabinet Secretaries respectively but the *Constitution* does not specifically define the functions of Cabinet Secretaries which he argued are defined by the President in exercise of his executive authority. Mr Bitta argued that article 132(3) (b) of the *Constitution* empowers the President to direct and co-ordinate the functions of ministries while article 156(4) sets out the functions of the Attorney General which pursuant to article 156(c) include any other functions assigned by the President.

7. He submitted that the *Constitution* or Parliament may assign functions to the Attorney General, that under article 132(3)(c) the President may, by a decision in the Gazette assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary provided it is not inconsistent with any Act of Parliament, and that vide the Executive Order, the President only designated portfolio and responsibilities to the Cabinet Secretaries. To buttress his arguments, counsel cited section 3 of the *Interpretation and General Provisions Act* in support of the proposition that in all enactments or public documents words shall have the meanings assigned to them except where the context is inconsistent with the interpretation. He argued that the definition of a Cabinet Secretary includes the Attorney General and added that under the *Legal Education Act*, where the President by dint of article 132(3) (c) of the *Constitution* has not assigned a function to the Cabinet Secretary, the Attorney General is constitutionally and statutorily vested with powers similar to those of a Cabinet Secretary. He faulted the learned judge for interpreting the said provisions in a manner that rendered the provisions otiose. Further, he submitted that the learned judge disregarded the legislative intention and misconstrued the authority vested in the Attorney General. He relied on *Council of County Governors v Inspector General of National Police Service & 3 others* [2015] eKLR and *Dr Timothy M*

Njoya and 6 others v Honourable Attorney General and another [2004] eKLR in support of the cardinal rule for the construction of acts of Parliament that they should be construed according to the intention expressed in the acts themselves.

8. In his oral highlights, counsel argued that the learned judge misdirected himself by finding that the Attorney General in performing his functions under the *Legal Education Act* would be in conflict with the Act. To support this line of argument, counsel argued that the appellant is specifically aggrieved by paragraphs 79 and 80 of the judgment and urged the court to allow the appeal. Answering questions from the court after the court drew his attention to the final orders in the impugned judgment, counsel reiterated that the appellant is aggrieved by the above two paragraphs. We shall shortly reproduce the two paragraphs referred to above.

9. We have gone through the entire record and the appellant's submissions with utmost circumspection. The attempt by the appellant to challenge the two paragraphs in the judgment as opposed to the court's final orders/decree raises a pertinent question which goes to the root of the maintainability of this appeal. For ease of reference, we here below reproduce the two paragraphs.

> 79. It is therefore clear that cap 2 cannot be invoked for the purposes of construction or interpretation of the *Constitution*. It is therefore my view that the Attorney General is not a Cabinet Secretary for the purposes of the *Constitution*. He can however be assigned duties and functions by the President as long as the same is not inconsistent with the provisions of any Act of Parliament.
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> 80. Under section 4(5) of the *Legal Education Act*, the Council of Legal Education comprises of inter alia, the Attorney General. However, the appointments are to be made by the Cabinet Secretary for the time being responsible for matters relating to legal education, who is not expressly mentioned as a member of the Council. In my view the spirit of the Act contemplates that the Cabinet Secretary would a person other than the Attorney General since the resignation of members of the Council, and this includes the Attorney General, is to be made to the Cabinet Secretary.

10. The key question here is whether this appeal is challenging the decree of the court or the views expressed by the learned judge. Section 66 of the *Civil Procedure Act* provides for appeals to this court from the High Court in the following words:

> 66. Appeal from decree of High Court except where otherwise expressly provided in this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie from the decrees or any part of decrees and from the orders of the High Court to the Court of Appeal.

11. A careful perusal of the above provision shows that an appeal shall lie to the Court of Appeal from decrees or any part of decrees and from the orders of the High Court. Decree is defined in section 2 of the *Civil Procedure Act* as follows:

> " decree" means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; It includes the striking out of a plaint and the determination of any question within section 34 or section 91, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up;

Explanation: --A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;"

12. Decree as defined in section 2 above means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. The two paragraphs the appellant is unhappy with did not conclusively determine the dispute, so, going by the above definition, the two cannot be decrees to be appealed against.

13. The same section defines an order as follows: "Order" means the formal expression of any decision of a court which is not a decree, and includes a rule nisi. Again, the two paragraphs cannot qualify to be orders to be appealed against.

14. The right to appeal is a creature of statute and an appeal can be presented, only: (i) by a party in the suit if he is aggrieved by the judgment; or (ii) by a person who is not a party but who is aggrieved by the judgment if he seeks and gets leave of the court to prefer an appeal against the judgment. Unless a right of appeal is clearly and expressly given by statute, it does not exist. Whereas a litigant has a right to institute any suit of a civil nature in some court or another, no right of appeal can be given except by express words. In other words, a right of appeal infers in no one and therefore an appeal for its maintainability must have the clear authority of law. The right of appeal, which is a statutory right, can be conditional or qualified. If the statute does not create any right of appeal, no appeal can be filed.

15. What is legislatively not permitted cannot be read by implication, not in respect of right of appeal, as it "is a creature of statute." An appeal, as is well known, is the right of entering a superior court invoking its aid and interposition to redress an error of the court below. The central idea behind filing of an appeal revolves round the right as contradistinguished from the procedure laid down therefor. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute.

16. Under the *Civil Procedure Act* and the rules made thereunder, an appeal lies only as against a decree or as against an order passed under rules from which an appeal is expressly allowed by order 43, rule 1. The first sentence in the two paragraphs the appellant cited are mere findings by the learned judge. The last sentences are his views. No appeal can lie against a mere finding for the simple reason that the *Civil Procedure Act* and the Rules do not provide for any such appeal. This principle of law was laid down by the Supreme Court of India *In the Matter of Smt Ganga Bai v Vijay Kumar and others* 1974 AIR 1126, 1974 SCR (3) 882 which held that an appeal does not lie against mere 'findings' recorded by a court unless the findings amount to a 'decree' or 'order'. Also, the Supreme Court of India in *Sahadu Gangaram Bhagade v Collector*, [1970] 1 SCC 685 observed that the right given to an appellant in an appeal is to challenge the order under appeal to the extent he is aggrieved by that order. Similarly, the

Supreme Court of India in *State of Andhra Pradesh and others v B Ranga Reddy (D) by LRs and Others* Civil Appeal No 17486 of 2017 held that an appeal will not lie against the finding unless it amounts to decree within the meaning of section 2(2) of the Civil Procedure Code.

17. We now turn to the grounds of appeal. We have addressed our minds to each ground of appeal and juxtaposed the grounds cited against the final orders issued by the High Court. For starters, grounds (a) to (e) do not in any manner challenge the decree. For example, ground (1) faults the learned judgefor making a finding that the *Constitution* sets out specific duties for Cabinet Secretaries thereby precluding other persons from performing such specified functions. A reading of the orders issued by the court show that no such orders were issued as the appellant suggests in the above ground. Similarly, in the final orders, there is no such a finding in the decree as claimed in ground 4 of the appeal. The other grounds suggest that the learned judge failed to appreciate the various issues alleged therein but there is no attempt to suggest that the alleged failure (if any) led to the wrong findings, so the final orders still remain unassailed.

18. Looking at the grounds of appeal, we are tempted to conclude that either the appellant did not understand the nature of the declaratory reliefs issued by the court, or misconstrued the entire judgment and principally drew the grounds of appeal directed at the learned judgesreasoning in the body of the judgment and forgot that the appeal lies against the decree which is the final order of the court and is therefore appealable to this court. The appeal presents a unique scenario where the appellant seems to be unhappy with the learned Judges reasoning and opted to overturn the reasoning as opposed to the final orders. We have cited enough authorities above and the law to affirm that an appeal only lies against the final decree/orders.

19. In any event, had the appellant properly understood the final decree, he would have appreciated that the learned judge simply issued declarations clarifying the law. A declaratory order means a ruling that is explanatory in purpose; it is designed to clarify what before was uncertain or doubtful. A declaratory order constitutes a declaration of rights between parties to a dispute and is binding as to both present and future rights. Declaratory judgments are typically sought as a means of preventing a dispute by removing 'legal uncertainty' as to the applicable law and the rights and obligations of the parties.

HWR Wade in "*Administrative Law*" 5th Edition at page 523 stated as follows in reference to a declaratory judgment:

> " A declaratory judgment by itself merely states some existing legal situation. It requires no one to do anything and to disregard it will not be contempt of court. By enabling a party to discover what his legal position is, it opens the way to the use of other remedies to give effect to it, if that should be necessary."

20. It is clear from the above definition that a declaratory judgment is very limited in its powers. All it can do is clarify a legal relationship or state of affairs by stating the court's opinion of it. In other words, it states the court's authoritative opinion regarding the exact nature of the legal matter without requiring the parties to do anything. It is also important to bear in mind the requirements that are required at law for the satisfaction of the court before it can grant a declaratory relief. The Singapore Court of Appeal in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another* [2006] 1 SLR (R) 112 set out the following conditions for issuing declaratory reliefs:

    a) The court must have jurisdiction and power to award the remedy.

    b) The matter must be justiciable in the court.

c) As a declaration is a discretionary remedy, it must be justified by the circumstances of the case.

d) The plaintiff must have locus standi to bring the suit and there must be a real controversy for the court to resolve.

e) Any person whose interests might be affected by the declaration should be before the court; and

f) There must be some ambiguity about the issue in respect of which the declaration is asked for so that the court's determination would have the effects of laying such doubts to rest.

21. The Supreme Court of Appeal of South Africa in *Durban City Council v Association of Building Societies* 1942 AD 27 at 32 suggested a two stage approach in determining whether or not to issue a declaratory relief:

(1) "the court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation'"; and then, if so satisfied,

(2) "the court must decide whether the case is a proper one for the exercise of the discretion conferred on it".

22. In our view the above tests were met and therefore the orders were properly issued. To paraphrase Edmund Blackadder: Law without remedies is like a broken pencil. Pointless. ('Chains' (1986) Episode 6 Blackadder II ('Queeny: And me, did you miss me Edmund? Blackadder: Madame, life without you is like a broken pencil. Queeny: Explain. Blackadder: Pointless.'). Indeed, for Justice Oliver Wendell Holmes and his realist progeny, the law is nothing but remedies: 'The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.' ('The Path of the Law' in Collected Papers [1920] 173). The ultimate concern of virtually all litigants is what the court orders, not why it orders it.

23. Our reading of the orders issued by the trial court leave no doubt that the learned judge simply declared the law. For example, the first order reads: (a) A declaration that whereas the respondent the Attorney General, is a member of the Cabinet, he is not a Cabinet Secretary and therefore cannot, where to do so would be contrary to an Act of Parliament, perform or purport to perform the functions specifically reserved for a Cabinet Secretary under any piece of legislation. This order is in our view a straight forward declaration and the underlined part simply state that the Attorney General cannot do what the law does not permit him to do.

24. The second declaration reads: (b) "A declaration that the respondent's purported exercise of Cabinet Secretarial functions under the *Legal Education Act*, 27 of 2012 or under any other piece of legislation, where the same is inconsistent with or contrary to the spirit Constitution or the law in null and void.: Again, the underlined sentence is self-explanatory. The declaration outlaws exercise of power which is contrary to the spirit of the *Constitution* or the law. It means if the power is exercised inconformity with the *Constitution* and the law, then it would be lawful. This order is harmless. Again, none of the grounds of appeal seems to challenge this order.

25. The third relief granted reads: (c) "A declaration that before performing Cabinet Secretarial duties, where permitted by the *Constitution* and the law, the Attorney General must take the oath appropriate to Cabinet Secretaries." We find nothing wrong with this declaration.

26. Also, order number (d) simply declares the law. It reads: (d) “A declaration that the Attorney General, while performing the duties of a Cabinet Secretary is subject to the process of removal from that position of a Cabinet Secretary.” The argument before us did not present a contrary opinion.

27. Order number (e) prohibits assigning of power to the appellant contrary to the letter and spirit of the *Constitution*. It reads: “A declaration that any executive order that purports to assign the respondent, the Attorney General, cabinet secretarial functions and powers contrary to the letter and spirit of the *Constitution* and the law, is invalid, null and void.” Again, the underlined sentence underscores conformity with the *Constitution* and the law.

28. Lastly, in the final order, conscious that some decisions may have been undertaken prior to the judgment, and aware of the consequences of invalidating such decisions, the learned judged fashioned an appropriate relief pursuant to article 23 of the *Constitution* as follows:- “...pursuant to article 23 of the

> Constitution, I declare that this decision will only affect future actions of the respondent and the declaration of unconstitutionality of the Cabinet Secretarial functions of the respondent will be suspended for a period of three months to enable the executive take appropriate remedial action.” To our mind, the learned judge did not upset or invalidate any decisions hitherto taken.

29. Flowing from our analysis of the law and the conclusions arrived at, we find no basis at all to upset the impugned judgment. Accordingly, we hold that this appeal lacks merit. We dismiss it with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

HANAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR