IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 222 OF 2016

BETWEEN

HIS HIGHNESS PRINCE AGA KHAN SHIA IMAMI ISMAILI

NATIONAL CONCILIATION AND ARBITATION BOARD FOR

KENYA.....APPELLANT

AND

THE HONOURABLE ATTORNEY GENERAL.....RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Onguto, J.) delivered on 31st May 2016

in

High Court Petition No. 332 of 2015)

****

JUDGEMENT OF THE COURT

1. The appellant, His Highness Prince Aga Khan Shia Imami Ismaili National Conciliation and Arbitration Board for Kenya, has appealed a judgment of the High Court at Nairobi (*Onguto, J.*) delivered on 31st May 2016 dismissing its constitutional petition (No. 332 of 2015) in which it sought declarations that: every Ismaili Muslim in Kenya has the right to freedom of religion and belief and the right to manifest the same through practice and observance of the provisions of the Ismaili Constitution as promulgated by His Highness the Aga Khan; that the provisions of Article 13 in the Ismaili Constitution empowering the appellant to hear and determine disputes between Ismaili Muslims in Kenya are in consonance with the provisions of Article 159(2)(c) of the Constitution of Kenya, 2010 and the alternative dispute resolution mechanisms provided therein should be promoted by the Kenyan courts; and that it has jurisdiction under the said Article 13 to hear and determine such disputes between Ismaili Muslims in Kenya.

2. That petition was founded on a ruling delivered by the High Court on 5th June 2014 in the case of ***Tazmin Shamshudin Jamal vs. Shabir Hussein Somjee Rajan, Misc. Application No. 8 of 2013 [2014] eKLR*** where *Kimaru, J.* determined: that the appellant has no jurisdiction to grant divorce or to entertain custody and maintenance disputes; that matters pertaining to divorce and custody and maintenance of children are within the exclusive jurisdiction of the courts and the Kadhis Court; that an arbitral award given by the appellant dissolving a marriage and providing for custody and maintenance of children could not be recognized under Section 36 of the Arbitration Act; and that the Arbitration Act was intended for commercial disputes and not for personal law matters.

3. The petition was dismissed on the grounds that the appellant was seeking to unprocedurally challenge the *"competently rendered judgment"* of *Kimaru, J.* in a court of equal status; that the avenue that was available to the appellant was to appeal the decision of *Kimaru, J.* or to apply for its review; that a judge in the Constitutional & Judicial Review Division of the High Court *"has no power or jurisdiction to supervise, superintend, correct or guide another judge of the High Court"*.

4. Aggrieved, the appellant lodged the present appeal on the grounds that the Judge should have found that the appellant's constitutional rights, including freedom of religion, right to fair hearing and the right to equal protection of law were violated; that the Judge failed to uphold the provisions of Article 159(2)(c) of the Constitution and to appreciate that the appellant was not a party to the proceedings before *Kimaru, J.;* that the Judge misconstrued the nature of the petition and wrongly found that he was being asked to sit on appeal from a decision of a court of concurrent jurisdiction; that the petition did not seek to review, or to set aside or to vary the decision of *Kimaru, J.;* and that the Judge did not properly exercise his discretion and failed to do justice in the matter.

5. Urging the appeal before us, ***Mr. John Mbaluto***, learned counsel for the appellant, relied on written submissions which he highlighted. He submitted that the result of the judgement by the High Court was to leave the appellant without recourse; that in effect, part of the Ismaili Constitution was rendered in effective; and that in dismissing the petition on procedural grounds, the Judge failed to heed the demand under Article 159(2)(d) of the Constitution that justice shall be administered without undue regard to procedural technicalities; and that although the Judge was apologetic, he failed to do justice in the matter.

6. Counsel submitted that the Judge misapprehended the nature, purport and intent of the petition before him by misconstruing it to be an appeal from the decision of *Kimaru, J.;* that the Judge failed to appreciate that as the appellant was not a party to the proceedings before *Kimaru, J.*, the avenue of either appealing or applying for review of that judgement was not open to the appellant; that in any event, in view of the decision of this Court in ***Nyutu Agrovet Limited vs. Airtel Networks Limited (2015) eKLR***, to the effect that there is no right of appeal in arbitration matters, the Judge did not appreciate the difficulty the appellant would have encountered in appealing that decision.

7. According to counsel for the appellant, it was also not open to the appellant to apply for review of the decision of *Kimaru, J.* having regard to the parameters under which review is permissible. The case of ***Pancras T. Swai vs. Kenya Breweries Ltd (2014) eKLR*** was cited for the proposition that the matter was not amenable for review.

8. Opposing the appeal, ***Mr. Charles Mutinda***, learned counsel for the respondent also relied on written submissions which he highlighted. He submitted that the Judge was right in holding that there can be no violation of fundamental rights arising from a judgment of a court of competent jurisdiction; that the avenue that was available to the appellant, as the Judge correctly held, was to either appeal or apply for review of the judgement of *Kimaru, J;* that the Judge correctly found, consistently with the decision of this Court in the case of ***Peter Nganga Muiruri vs. Credit Bank Limited, Civil Appeal No. 203 of 2006 [2008] eKLR***, that a judge of the High Court has no mandate or power to superintend, supervise or correct another judge of the same court; and that, therefore, the petition was not dismissed on the basis of trivial procedural issue but on a matter of substance.

9. With regard to the arguments that the impugned judgment: left the appellant without recourse; rendered a part of the Ismaili Constitution inoperative and failed to heed the command for adoption of alternative dispute resolution mechanism under Article 159 of the Constitution, it was submitted that the appellant should align its commendable efforts with the law, in particular Sections 71, 72 of the Marriage Act, 2014 providing for dissolution of marriage and authorization by the Registrar of Marriages and Section 85 of the same Act which requires matters concerning children to be dealt with in accordance with the Children Act.

10. We have considered the appeal and the submissions by learned counsel. The central question in this appeal is whether the Judge was right in concluding that the appellant's petition was in effect an attack on the judgement of the High Court delivered by *Kimaru, J.* on 5th June 2014 in ***Tazmin Shamshudin Jamal vs. Shabir Hussein Somjee Rajan*** (above).

11. In concluding that the appellant was, by its constitutional petition, seeking to unprocedurally challenge the *"competently rendered judgment"* of *Kimaru, J*. and that he could not interfere with that judgment, the Judge expressed:

> ***"I hasten to state that the impugned judgement was rendered by a court of equal status. How then can this court question the correctness or otherwise of that judgement? I see no way that this court can come to the petitioner's aid without doing violence to the above procedural principles."***

12. As already noted, the appellant complains that the Judge misapprehended the nature of the petition; that the constitutional division of the court was not being asked to sit on appeal from the decision of *Kimaru, J.*, and neither was the constitutional petition seeking to review, vary or set aside the decision of *Kimaru, J.*

13. Whereas the reliefs the appellant was seeking in its constitutional petition were for declarations that its fundamental rights to freedom of religion, fair hearing and right to equal protection of the law were violated, the basis of the petition was that: the

decision of *Kimaru, J.* had declared that the appellant had no jurisdiction to decree divorce or order custody and maintenance; that the decision of *Kimaru, J.* negated the dictates of Article 159 of the Constitution requiring alternative dispute resolution mechanisms to be adopted; and that the appellant, being directly affected by that decision, had not been accorded an opportunity to be heard.

14. Having reviewed the petition, there is no doubt in our minds that it was hinged on, and precipitated by the judgment of *Kimaru, J.* For instance, at para 3.5.1 of the petition, the appellant averred:

> ***"On 5 June 2014, the High Court (Kimaru J) delivered a Ruling on an application brought pursuant to the provisions of section 36 of the Arbitration Act and Rule 4 of the Arbitration Rules seeking leave of the court to have an award made by the Petitioner adopted as a Judgement of the Court. In the course of his ruling, the learned Judge made adverse findings as against the Petitioner notwithstanding that it had not been enjoined to the proceedings nor was the Petitioner accorded an opportunity to be heard in the matter."***

15. At para 4.3.2 of the petition where the appellant complained that its constitutional right to a fair trial and hearing was violated, the appellant again challenged the decision of *Kimaru, J.* and averred:

> ***"In making adverse findings as against the Petitioner which directly and gravely impact on its mandate and functions, without having afforded the Petitioner a right of audience, the learned Judge violated the petitioner's right to a fair hearing, contrary to Articles 25(c) and 50(1) of the Constitution."***

16. Based on the foregoing pleading in the petition, it is clear that the grievances the appellant sought to vindicate through the constitutional petition emanated directly from the decision of *Kimaru, J.*

17. The supervisory jurisdiction of the High Court does not extend to courts of the same status. Article 165(6) of the Constitution expressly removes superior courts from the purview of the supervisory jurisdiction of the High Court. It provides that:

> ***"(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."***

18. In ***Peter Ng'ang'a Muiruri vs. Credit Bank Limited*** (above) on which the learned Judge of the High Court relied, although a pre-2010 Constitution decision, this Court was categorical that a judge of the High Court has no powers to supervise another judge of the same court. The Court expressed:

> ***"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 l "Jurisdiction is everything. Without it, a court has no power to make one more step"***. [Emphasis added]

19. Accordingly, *Onguto, J.* quite rightly declined the invitation to superintend over the decision of a judge of the same court and we are therefore in agreement with the learned Judge that it was not open to him to question the correctness or otherwise of the decision by *Kimaru, J.*

20. The appellant then complains that because it was not a party to the proceedings before *Kimaru, J*., and it could not therefore challenge that decision on appeal. But is that correct? Under Rule 75 of the Court of Appeal Rules, the right to lodge a notice of appeal is not confined to parties to a suit. *"Any person"* affected by a decision is entitled to lodge a notice of appeal. In ***Law Society of Kenya Nairobi Branch vs. Malindi Law Society & 6 others [2017] eKLR***, this Court had this to say:

> ***"This brings us to the applicability of Rule 75 of the Rules of this Court. It provides:***
>
> ***"75 (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the superior court." [Emphasis added]***
>
> ***27. The Rule is specific about "a person who desires to appeal" and not a party to the impugned decision…"***

The Court then went on to conclude that:

> ***"When Rule 75 as well as the above extracts from Halsbury's Laws of England are read in conjunction with the Supreme Court's interpretation of Articles 22, 258 and 260 of the Constitution, this creates no doubt in our minds <u>that a person, association, body</u> <u>corporate or an unincorporated body, have the locus standi, not only to institute original proceedings but also appellate proceedings provided that such a party is aggrieved by the decision intended to be challenged</u>."***
>
> [Emphasis added]

21. It cannot, therefore, be an excuse for the appellant to say that it was not a party to the proceedings before *Kimaru, J.* and could not therefore challenge that decision on appeal. As a person aggrieved by that decision, it had every right to challenge it on appeal, but did not do so.

22. Finally, there is the complaint that the Judge dismissed the petition on account of the procedure followed by appellant and thereby failed to heed Article 159(2)(d) of the Constitution which demands that justice be administered without undue regard to procedural technicalities. Although the Judge described the appellant's petition as *"unprocedural"* he dismissed it on the substantive ground of want of jurisdiction to challenge a decision of a court of equal status. Want of jurisdiction is certainly not a procedural technicality. There is no merit in this complaint.

23. In the result, the appeal fails and is accordingly dismissed with costs.

Orders accordingly.

Dated and delivered at Nairobi this 8th day of November, 2019.

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

<u>DEPUTY REGISTRAR</u>