Bellevue Development Company Ltd v Gikonyo & 3 others; Kenya Commercial Bank & 3 others (Interested Parties) (Civil Appeal 239 of 2018) [2018] KECA 330 (KLR) (21 September 2018) (Judgment)

Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR

Neutral citation: [2018] KECA 330 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 239 OF 2018

PN WAKI, PO KIAGE & K M'INOTI, JJA

SEPTEMBER 21, 2018

BETWEEN

BELLEVUE DEVELOPMENT COMPANY LTD ..... APPELLANT

AND

HON. MR. JUSTICE FRANCIS GIKONYO ..... 1ST RESPONDENT

HON. MR. JUSTICE CHARLES KARIUKI ..... 2ND RESPONDENT

PAUL MWANIKI GACHOKA ..... 3RD RESPONDENT

VINAYAK BUILDERS LIMITED ..... 4TH RESPONDENT

AND

KENYA COMMERCIAL BANK ..... INTERESTED PARTY

THE HONOURABLE ATTORNEY GENERAL ..... INTERESTED PARTY

THE JUDICIAL SERVICE COMMISSION ..... INTERESTED PARTY

KENYA NATIONAL HUMAN RIGHTS COMMISSION ... INTERESTED PARTY

(An appeal from the Ruling of the High Court of Kenya at Nairobi, (Fred A. Ochieng, J.) dated 3rd day of 2017 in H. C. C. C. No. 371 of 2016)

JUDGMENT

JUDGMENT OF KIAGE JA,

1. By this appeal, the appellant, Bellevue Development Company Limited challenges the decision of the High Court (Ochieng, J) which struck out the appellant's petition. That decision followed a

preliminary objection raised by the 1st and 2nd respondents Hon Mr Justice Francis Gikonyo and Hon Mr Justice Charles Kariuki (the Judges), who were then, as now, sitting judges of the High Court of Kenya. The objection was on various limbs which, however, boiled down to this: the petition was incompetent and fatally defective for violating the Judges? judicial immunity and that the learned Judge had no jurisdiction to enquire into or otherwise supervise the Judges who had equal status and jurisdiction.

2. The stricken petition was filed by the appellant complaining, as against the Judges, that the duo had separately made various rulings and rendered determinations on 18th March 2014, 8th April 2014 and on 8th April 2016 which were in bad faith and breached its right to a fair trial of its dispute with Vinayak Builders Limited (the 4th respondent). That dispute was the subject of HC Civil Suit No 571 of 2010 (OS) filed by the appellant against the 4th respondent before the Milimani Commercial & Admiralty Division of the High Court. It had also been the subject of arbitration proceedings before, initially, Norman Mururu (deceased) and later Paul Mwaniki Gachoka, the third respondent.

3. In view of the narrow view I take of the issues before us in this appeal, I do not find it necessary or useful to go into any detailed narration of the nature of the main, and the chequered history of, the dispute between the parties in that suit, its relevance being doubtful to the determination of this appeal.

4. In its memorandum of appeal the appellant is aggrieved that the learned Judge erred in law and fact in eight respects which can be summarized thus;Misinterpreting and misapplying the Constitution in relation to his jurisdiction, the petition before him and the preliminary objection.Failing to hold that the rights and freedoms of the Bill of Rights can only be subject to the limitations contemplated in the Constitution.Impairing (*sic*) the supremacy of and failing to defend and uphold the Constitution in letter and spirit over other law.Limiting and impairing the nature and scope of his jurisdiction to entertain the petition.Determining that judicial immunity is absolute even when judges act dishonestly.Awarding the costs to the respondents and interested parties.

5. The appeal was heard together with a notice of motion dated 23rd August 2017 by which the 4th respondent sought to strike out the record of appeal for having been filed without leave of Court and for having been served on 28th July 2017, thus out of time (by one day). As the appeal itself was heard on the merits, I do not see how the ends of justice will be served by a consideration of that application. There is no utility in engaging scarce judicial time in a wholly academic exercise.

6. At the hearing of the appeal, Mr Muturi Mwangi, the appellant's learned counsel submitted that the central question is whether judicial immunity, is absolute, and he answered the question in the negative. To him, Article 160(5) of the *Constitution* unambiguously declares a qualified immunity as follows;

> "(5) 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."

7. It was counsel's contention that a suit can properly be instituted against a judge if either or both of the two elements of good faith and lawfulness are lacking from the act or omission complained of. He added that in the instant case, it was manifestly clear that there was lack of good faith.

8. When the Court posed to counsel where the line is to be drawn between gross errors of law and ill-will, his answer, if I understood him correctly, was merely that ill will was to be inferred from the fact that the Judges went against the clear provisions of statute in ruling as they did. And when we inquired of him whether he had any authorities he could cite to buttress what was clearly a novel proposition, his equally unhelpful, indeed rather evasive answer, was that "we have the Constitution which is unambiguous."

9. Opposing the appeal, Mr Wanga learned counsel for the Judges characterized it as a direct attack on the independence of the Judiciary. He asserted that the real motive for the petition against the Judges was an attempt to create a basis for the re-litigation of the award by the 3rd respondent which favoured the 4th respondent. He pointed out that the Judges were impleaded in their capacity as judicial officers but the appellant never pleaded the particulars of the alleged bad faith in the entire petition. He urged that judges can and do make mistakes and that is precisely why there exists an appellate process. He concluded his submissions by defending the upholding of the preliminary objection raised since the petition was improperly inviting the learned Judge to supervise fellow judges. Moreover, the suit in which the rulings were made was still pending, which rendered the petition an abuse of process.

10. Going next, Mr E. L. Lubulellah, the 4th appellant's learned counsel also termed the petition an invitation to the learned Judge to supervise judges of equal jurisdiction. It was also an attempt to circumvent the decision of the Commercial and Admiralty Division of the High Court in which Odunga, J had on 21st March 2012 terminated arbitral proceedings before Arbitrator Mururu. He pointed out that Gikonyo, J merely declined to issue an injunction against the proceedings before Arbitrator Gachoka while Kariuki, J merely recognized and adopted the award that ensued for enforcement. Those actions by the Judges, in counsel's view, did not reveal and were totally devoid of bad faith, ill-will or malice and the learned Judge was correct to uphold the preliminary objection.

11. Finally learned counsel Mr Ohaga, who appeared with Ms. Mwika for the Kenya Commercial Bank, the 1st Interested Party (*sic*) submitted that in so far as the appellant in its petition pleaded that the Judges acted in bad faith, it was incumbent upon it to state the particulars of that bad faith and it failed to do so. He went on to opine, however, that the PO on judicial immunity ought to have been upheld in respect of the judges only, even though without them the petition against the other respondents would have failed in any event. Regarding the notice of motion, it was Mr Ohaga's view, which accords with what I have already stated, that it served no purpose and was rendered moot, the appeal having been heard.

12. In his brief response Mr Mwangi reiterated that the learned Judge was wrong to declare and uphold the absoluteness of judicial immunity, and besought the Court to allow the appeal.

13. I have carefully considered the record of appeal, the submissions made by counsel and the relevant law. The issue before us as earlier indicated is quite narrow, limited to a determination of whether the learned Judge was right or wrong in holding that the Judges were immunized from suit and that he had no jurisdiction to supervise judges of equal status and jurisdiction.

14. I have no difficulty upholding the learned Judge's holding that as a judge of the High Court he had no jurisdiction to enquire into or review the propriety of the decisions of the Judges, who were of concurrent jurisdiction as himself. In our system of courts, which is hierarchical in nature, judges of concurrent jurisdiction do not possess supervisory jurisdiction over each other. No judge of the High Court can superintend over fellow judges of that court or of the superior courts of equal status. That much is plain common sense. It has, moreover, been expressly stated in Article 165(6) of the *Constitution* in these terms;

> " The High Court has supervisory jurisdiction over the subordinate courts and over any other person, body or authority exercising a judicial or quasi judicial function, but not over a superior court." (Our emphasis)

15. The learned Judge reasoned, correctly in my view, that an enquiry into the complaints in the appellant's petition against the Judges called upon him to determine the lawfulness or good faith basis of both their decisions and their conduct, and he could not purport to arrogate to himself the power to review

their decisions over which he had no authority. Such an undertaking would have been a plain nullity as had been stated by this Court in *Peter Ng'ang'a Muiruri v Credit Bank Ltd & 2 others* Civil Appeal No 203 of 2006 which the learned Judge cited. The Court in dispelling the notion that a judge of concurrent jurisdiction could supervise fellow judges had stated as follows;

> " 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."

16. This position is so well established that it would be a strange aberration for a judge to embark on what is essentially an examination of the judicial conduct and pronouncements of judges of the same status as himself, a task that is left to courts and judges of higher status in the hierarchy, by way of appeals. Pronouncements by judges of the High Court on this point are germane and demonstrative of this understanding. In *Kombo v Attorney General* [1995-98] 1EA 168, cited by Ole Keiwua, J (as he then was) properly rejected and repulsed an invitation to scrutinize and interrogate the conduct and decision of a judge of concurrent jurisdiction mounted by way of an application for enforcement of fundamental rights under section 84 of the retired Constitution. Said the judge;

> " All the applicant's complaints were criticisms on how the election court [High Court] had acted and this was in the nature of an appeal which appeal did not lie to a judge of coordinate jurisdiction as the election court and was further an attempt to circumvent the provision of section 44(5) of the *Constitution* which provides against an appeal from decisions of the election court. The election court had sat as a High Court in terms of section 44(1) of the *Constitution* whereas the present application was made pursuant to provisions of section 84 of the *Constitution*. The High Court sitting pursuant to the provisions of section 84 of the *Constitution* cannot override the decisions of the same High Court exercising its constitutional jurisdiction."

17. In *CIvicon Limited v Kenya Revenue Authority & another* [2014] eKLR, Muriithi, J, after examining various decisions on the subject, expressed himself quite strongly on the impropriety of parties attempting to reopen and relitigate decided issues in original form through the subterfuge of clothing them in constitutional garb;

> " I agree with the judicial policy that is variously set out by the authorities relied by the 2nd respondent-*Peter Ng'ang'a Muiruri v Credit Bank Ltd & another*, Court of Appeal Civil Appeal No 203 of 2006 and *Ventaglio International SA and another v The Registrar of Companies and another*, Nairobi HC Constitutional Petition No 410 of 2012 (per Lenaola, J) that the High Court's Constitutional Division, indeed any other Division, cannot supervise any other superior court of concurrent jurisdiction or superior jurisdiction. The supervisory jurisdiction is over subordinate courts under Article 165(6) of the *Constitution*. I also consider that it is an abuse of the court process for a litigant to seek to obtain through a constitutional petition or indeed any to other court process before the same court of concurrent jurisdiction a different decision from one already rendered by the court in other proceedings over the same matter. The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the court but cannot be permitted to re-agitate the matter through a constitutional petition or other originating proceedings. See *Beta Healthcare International Ltd v Commissioner of Customs, and 2 others*. Nairobi HC Petition No 125 of 2010 (per Majanja, J)"

18. I am in agreement with that analysis which I approve of. It is not difficult to see that the petition filed by the appellant against the Judges fell in the category of proceedings castigated and the learned Judge was well-entitled to uphold the objection against it.

19. Turning to the question of judicial immunity, the position taken by the learned Judge, and by which the appellant is aggrieved, is that judges when exercising their judicial functions are invested with an absolute immunity from action, whether civil or criminal. In so holding the learned Judge relied on the *Peter Ng'ang'a Muiruri Case* (*supra*) which posited that the Chief Justice, as a judge executing his judicial functions within jurisdiction, enjoys absolute immunity from being sued civilly for his expressions. This Court there approved of the sentiments of Lord Esher M.R. from over a century ago in *Anderson v Gorrie* [1895]1QB 668 at 670-671;

> " ...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.
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> ...
>
> 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."

20. Much as the Court approved of Lord Asher's sentiments, the principle or doctrine of judicial independence dates much further back and can be traced to the Star Chamber of feudal England over four centuries ago. In *Floyd v Barker* 77 Eng. Rep 1305 (Star Chamber 1609), that Chamber held that a judge could not be prosecuted in another court for an alleged criminal conspiracy in the way he had handled a murder trial. The judges held that if the King wished to discipline a judge he needed to do it himself without resort to criminal prosecution. This notion has held sway ever since though not without its detractors.

21. Across the Atlantic, the U.S. Supreme Court in 1872 overruled an earlier *dictum* that had suggested that judicial immunity was limited and pronounced quite emphatically that judges could not be liable to suit even for malicious or corrupt acts. That holding in *Bradley v Fisher* 80 U.S. (13 Wall), 335, 351 (1972) remains the leading authority on the subject in American jurisprudence which is no different from English courts? pronouncements and goes further to give the rationale for the doctrine, which lies in the protection of judicial administration by leaving judges perfectly free to decide cases on the basis of law, evidence and conscience untrammeled by the spectre of litigation on account of their decisions. See also *Garnett v Ferrand* [1824-1834] All ER 244 at 246 per Lord Tenderden, CJ; and *Mc C v Mullan & others* [1984]3 ALL ER 908 at 916 per Lord Bridge, which the learned Judge very aptly considered and applied.

22. I agree with the interpretation of Article 160(5) of the *Constitution* that was expressed, (ironically, given this appeal), by Gikonyo, J in *Moses Wamalwa Mukamari v John O. Makali & 3 others* [2012] eKLR in which he delivered himself thus;

> " The protection offered to judicial officers in Article 160(5) of the *Constitution* is inherent in the independence of the judiciary as a state organ within the doctrine of separation of powers. The protection encapsulates protection from being sued in a personal capacity in a cause of action based on an act or omission emanating from the lawful performance of a judicial function. I am convinced; this is intended to make the cover against personal liability

complete, especially to prevent the essential substance of the protection from oozing out. If it were to be the contrary, that kind of interpretation will result into an absurdity, because, allowing the officer to be sued and appear in his personal capacity in a suit based on an act he did in the lawful performance of a judicial function, will already have blown away the very constitutional cover for the officer's fallibility provided under Article 160(5) of the *Constitution*.

...

...it will be contrary to the Constitution to enjoin the judicial officer in a suit challenging what he did in the lawful exercise of a judicial function. On his basis, the correct party in a proceeding such as this is the Attorney General, who is already a party inthe suit, and does not suffer any deficiency or impairment in law as to require the judicial officer to be cited as a party. See the case of *Chokolingo V A-g Trinidad and Tobago* where the Attorney General was substituted for the wrong party that had been sued in the case." "...to allow a judicial officer to be named as a party in this suit, will not only violate the constitutional restriction on that kind of practice, but will also extend embarrassment to the judicial officer as well as the judiciary-a state organ exercising delegated sovereign power of the people."

23. Mativo, J was also emphatic that the immunity afforded judges under our constitutional set up is absolute. His views, with which I respectfully agree, were expressed in *Maina Gitonga v Catherine Nyawira Maina & another* [2015] eKLR, as follows;

> " It is undoubted that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from criminal or civil suit arising from acts taken within or even in excess of his jurisdiction. Judicial immunity is necessary for various policies. The public interest is substantively weakened if a judge or a magistrate allows fear or criminal or civil suit to affect his decisions. In addition, if judicial matters are drawn into question by frivolous and vexatious actions, "there will never be an end of causes, but controversies will be infinite"

24. I have no difficulty whatsoever in holding that judicial officers are under Article 160(5) immunized from any action or suit on account of their performance of a judicial function. I do not apprehend that the words „good faith? and „lawful? in the sub-article are a qualification or limitation of the immunity for the rather obvious reason that so long as a judge is acting in a judicial capacity and exercising his usual jurisdiction, there is a commonsensical presumption that he is acting lawfully and in good faith. There exists an implicit covenant of good faith binding judges. That has to be the a priori position for to hold otherwise would lead to the absurd position of the good faith bases of judges? actions being debatable points and open to an intolerable deluge of litigation, each unhappy litigant suing judges left right and centre as wounded pride dictates.

25. I think that even though judges are fallible human beings like everybody else, a mechanism does exist in our laws for correcting whatever errors they may commit in the discharge of their juridical functions. Aggrieved parties are at liberty to appeal as a matter of course and that appellate system suffices to deal with ordinary errors of law and fact so that in the end justice is served. I also harbor no doubts that where a judge's conduct consists in egregious illegalities, violation of the judicial oath or outright illegalities and criminality, a mechanism for removal does exist and can be triggered in appropriate cases. I am satisfied that those mechanisms suffice to guard the integrity of the judicial process and to protect the rule of law and the rights of litigants. They ensure that judicial immunity, which is laudable and necessary for the protection of judicial independence does not morph into judicial impunity or some form of Frankenstenian tyranny against the law and the people.

26. Being of that persuasion, I cannot accept, less still lend approval to the appellant's ill-advised path of dragging the Judges into court by way of litigation against them in their personal capacities for their rulings delivered in the course and in the context of their lawful discharge of their judicial functions. The alleged particulars of ill-will and illegality were not supplied and would have been of no moment as the objections raised were bound to succeed. It is quite clear to me that the notion and spectre of judges being sued for discharging their judicial functions must be firmly resisted as a serious threat to judicial independence, the integrity of the judicial process, the sanctity of the rule of law and the liberty of all citizens which cannot be countenanced in a rational society and a constitutional democracy such as ours. Indeed, I see in an attempt such as was made here yet another portentious and alarming sign that a certain class of litigants, thankfully still few, and hopefully confined to the fringes of our otherwise law-abiding Wananchi, see courts and judges as a nuisance to be chained, lynched or quartered. Such moves to sue or punish judges with whose determinations, decisions and judgments a litigant is disenchanted ignore the critical, indispensable role a free, fair, fearless and fiercely independent judiciary plays as the defender of the *Constitution* and the arbiter of justice between parties, be they mighty or weak, and the last bastion of liberty for all citizens. As citizens expect judges to dispense justice without fear or favour, so must they let judges be Judges not defendants and respondents to spend their days and fortunes answering nuisance, ill-advised plaints, summons, petitions, motions and applications on account for the decisions they make in their judicial capacity.

27. I find it strangely curious that counsel for the appellants pressed on with the plea in intrepid fashion even when it was rather obvious that absent any authority to the contrary, the weight of all learning and judicial pronouncements presented is for the upholding of judicial immunity. I should hope that the Law Society and our country's Law Schools are not propounding and propagating a philosophy, cynical in its conception and Kafkesque in its consequences, that when a lawyer loses a case, his recourse is to sue the judge.

28. Ultimately, I find this appeal devoid of merit and would order that it be dismissed with costs.

JUDGMENT OF M'INOTI, JA

1. I have had the advantage of reading in draft the judgment of my brother, the Hon P. O. Kiage, JA, with which I agree. I only wish to add the following few points pertaining to Article 160(5) of the *Constitution*, on which this appeal turns. The rather brief provision provides thus:

> " 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"

2. Due to the employment of the phrases "action" and "suit", I am persuaded that the provision addresses itself to the civil liability of a judicial officer for good faith acts or omissions in the lawful performance of his or her judicial functions.

3. Contrary to what the appellant suggests, the purposes of the immunity provided by that provision is not to visit upon the citizens of Kenya, judicial impunity. In its true character, immunity is never the father of impunity. The judicial immunity conferred by Article 160(5) is an important pillar or prop of the independence of the judiciary, a core tenet of the Constitution of Kenya. The immunity is not for the personal benefit of judges; like the contempt power, it was never intended for the ego or personal interest of judges. The true intention is protection of the administration of justice. Judicial immunity is founded on public interest considerations that, while determining cases, judges should be free from external pressures and in particular, the anxiety of having to personally defend suits and actions at the

instance of parties who believe that the outcome of their cases should have been different from what the judge decreed.

4. In *Bradley v Fisher* 80 U.S. (13 Wall), 335, 351 (1972), Justice Field of the Supreme Court of the District of Columbia, delivering the opinion of the Court, declaimed the right of a litigant to institute an action against a judge and explained the rationale as follows:

> " For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful."

5. This appeal is an apt demonstration of why the makers of the *Constitution* of Kenya, 2010 deemed it necessary to elevate judicial immunity to a constitutional norm and why I agree with the interpretation of Article 160(5) taken by the Hon Kiage, JA. Under the previous constitutional framework, judicial immunity was supplied only by a statute, to wit, by section 6 of the *Judicature Act*, cap 8 Laws of Kenya. In this appeal, shorn of all semantics, the appellant's complaint is that the Hon Gikonyo and the Hon Kariuki, JJ misinterpreted and misapplied provisions of a statute. Although the complaint is embellished by the claim that the judges did not act in good faith in the lawful performance of their judicial functions, no particulars of bad faith are given, beyond the interpretation and application of the statute by the learned judges. In my view, the appellant's complaint is really the type that the Constitution intends to be cured by the appellate process that it has prescribed and created, and not through recourse to actions against the judges personally. Embellishing the complaint cannot alter the remedy that is constitutionally available to the appellant.

6. Where a judge acts in bad faith or omits to act in good faith in the lawful performance of his or her judicial function, that fundamentally raises questions of his or her integrity and fidelity to the judicial oath of office, and in my view, the remedy under the Constitution is not an action or suit against such judge, while allowing him or her to continue wreacking havoc from the hallowed seat of justice. Such a judge is a threat to the entire constitutional edifice and in particular it's values, principles and the judicial oath of office which demands of a judge discharge of the duties of the office diligently, without, among others, favour, bias, affection, ill-will prejudice or undue influence. In that eventuality therefore, the *Constitution* has provided, in Article 168, a specific and elaborate procedure for dealing with that kind of judge. I would accordingly read Article 160(5) to be saying that judicial immunity is not available to a judge who acts in bad faith or omits to act in good faith in the lawful performance of his or her judicial function when he is subjected to the appropriate mechanism prescribed by the Constitution.

7. I would dismiss the appeal in terms of the order suggested by the Hon Kiage, JA.

JUDGMENT OF WAKI, JA

1. I have had the advantage of reading in draft the judgments of my brothers Kiage and M'Inoti, JJA. I respectfully agree with the reasoning and conclusion reached by Kiage, JA and have nothing useful to add. The final orders shall be that the appeal is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER, 2018

O. KIAGE

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JUDGE OF APPEAL

M'INOTI

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JUDGE OF APPEAL

N. WAKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR