



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, OUKO & M'INOTI, J.J.A)

CIVIL APPEAL NO. 137 OF 2016

BETWEEN

DANIEL MAINGI MUCHIRI APPELLANT

AND

JUBILEE INSURANCE COMPANY LIMITED RESPONDENT

(An Appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (Onyancha, J.) dated the 12th day of March, 2015

in

HCCA No. 195 of 2015)

JUDGMENT OF THE COURT

This appeal was heard back to back on 3rd October, 2017 with four others as they are related to the same parties and subject matter but the decisions they challenge were made on diverse dates.

Specific to this appeal, on 3rd March, 2015, **Onyancha, J** ordered that he would give directions in H.C. Civil Appeal No. 195 of 2014 on 12th March, 2015 after he was informed that the application that was slated for *inter partes* hearing had been spent. The decision to give directions on 12th March, 2015 is the subject of a separate appeal in Civil Appeal No. 136 of 2016. Equally the appellant was dissatisfied by the subsequent directions that were given on 12th March, 2015. According to the record, when the matter came up, Mr. Ngoge, learned counsel for the appellant is recorded to have been absent. All the learned Judge did on that day was to direct that;

“1. Lower court ruling delivered – 7th May, 2014

2. Memorandum of appeal filed- 20th May, 2014

3. Record of appeal filed- 25th August, 2014

4. Record of appeal filed – 26th August, 2014

5. Certified decree at page 49-50

6. Appeal admitted to hearing-12th March, 2015

7. Court has jurisdiction

8. Stay of execution extended until appeal is disposed of

Order

Parties to take suitable hearing date at the registry.”

This is what has caused the appellant to appeal, contending, like in all the other four appeals, that by those directions, the learned Judge subverted the Constitution. It is argued that by proceeding to give directions on the hearing of the appeal before disposing of the appellant’s application dated 30th January, 2015, and that brought by the respondent dated 15th November, 2014 the learned Judge contravened **Articles 10, 19, 20, 21, 25, 27, 28, 29, 40, 43 and 48** of the Constitution; that the Constitution was also violated by the extension of interim orders of stay of execution without the consent of the appellant’s counsel and without *inter partes* hearing of the motion dated 15th November, 2014; that the learned Judge erred by failing to find that non-attendance of the appellant’s counsel on 12th March, 2014 was due to threats to arrest him after the learned Judge asked the court clerk to call the police to arrest him on 3rd March, 2015; that in the circumstances, the learned Judge subverted the Constitution by failing to disqualify himself from hearing the case; that he further breached the Constitution by allowing the firm of **Majanja & Luseno Advocates**, bearing the name of a judge of the High Court to conduct the case before him; and that the Constitution was violated by having two concurrent proceedings before the High Court and the subordinate court.

The response by the respondent to this appeal, like in the other four appeals, remain constant. Our decision in this appeal will not be different from those we have reached in the other four because of the similarity of issues.

Mr. Ngoge, learned counsel for the appellant has for the umpteenth time even after this Court, differently constituted in **Peter Odiwour Ngoge & Another v. Jubilee Insurance Co. Ltd & Another**, CA No. Nai. 298 of 2015 told him that the jurisdiction to enforce constitutional rights is with the High Court and not this Court, has repeated, in the instant appeal and the other four that what was before us was both an appeal and an original petition for enforcement of the appellant’s constitutional rights at the same time.

But we shall not tire to restate that the jurisdiction of this Court is purely appellate. It does not exercise original jurisdiction like the High Court. See **Article 164 (3)** of the Constitution and **section 3** of the **Appellate Jurisdiction Act**.

We reject all the 8 grounds upon which this appeal is premised for seeking from this Court orders for the enforcement of constitutional rights at an appeal stage without first applying for those reliefs in the High Court.

For the reasons that were given by the different bench in **Peter Odiwour Ngoge & Another V. Jubilee Insurance Co. Ltd & Another** (supra) and ourselves in the other four appeals, we also reject the complaint that the learned Judge erred by permitting the firm of **Majanja Luseno & Advocates** to conduct the matter. The complaint was far-fetched and a mere conjecture.

The learned Judge gave directions in accordance with **Order 42 Rule 13** of the Civil Procedure Rules. The orders of interim stay of execution were granted on 6th June, 2014 on condition that the respondent deposits the decretal sum before 16th June, 2014. After the respondent satisfied that condition the application was adjourned several times, each time the interim orders being extended to the next date. At no time did the appellant complain or apply to set aside the orders extending the original order. For

extending those very orders on 12th March, 2015, the learned Judge acted judicially in exercise of his discretion. It was the right thing to do in the circumstances, the respondent having met the terms for the issuance of the stay orders.

For these reasons we find no substance in this appeal. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 15th Day of December, 2017.

P.N. WAKI

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JUDGE OF APPEAL

W. OUKO

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K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR