



IN THE COURT OF APPEAL

AT NAIROBI

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

CIVIL APPEAL NO. 138 OF 2016

BETWEEN

DANIEL MAINGI MUCHIRI..... APPELLANT

AND

JUBILEE INSURANCE COMPANY LTD..... RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at Nairobi, (Sergon, J.) dated 6th November 2015 in HC CA. NO. 195 OF 2014)

JUDGMENT OF THE COURT

This is one of five appeals by *the appellant, Daniel Maingi Muchiri*, against *the respondent, Jubilee Insurance Co. Ltd.* All the five appeals arise from various interlocutory decisions of the *High Court in Civil Appeal No 195 of 2014*. Because the parties were not keen to consolidate the appeals, we heard them back-to-back. The other related appeals are *Civil Appeal Nos. 174 of 2014, 175 of 2014, 136 of 2016* and *137 of 2016*. This appeal, which the appellant's learned counsel, *Mr. Ngoge* claims is both an appeal as well as an original petition for enforcement of constitutional rights, is confined to the ruling by *Sergon, J.* dated 6th November 2016.

In view of the convoluted trajectory, by design or default, that the litigation has taken, it is apposite to briefly set out its antecedents. In or about 2003, the appellant filed in the subordinate court a personal injuries claim against one *Julius Maina Warui* whose motor vehicle was insured by the respondent, and obtained an award of damages on 23rd July 2012. On 22nd October 2013 he filed a declaratory suit, still in the subordinate court, against the respondent as the insurer of Warui's motor vehicle, seeking an order to compel the respondent to settle the decree.

The respondent filed a defence to that suit, but the same was struck out on 7th May 2014 as scandalous, frivolous and vexatious and judgment was entered for the appellant, although the trial court granted the respondent stay of execution for 30 days. Aggrieved by the ruling, the respondent filed *High Court Civil Appeal No. 195 of 2014* where it applied *ex parte* and obtained from *Onyancha, J.* on 6th June 2014, a conditional order of stay of execution, requiring it to deposit the decretal sum plus assessed costs and court interests in court on or before 16th June 2014. The respondent duly deposited the decretal sum and ultimately obtained an order staying execution of the decree of the subordinate court until the hearing and determination of the appeal, although in one of the related appeals, the issue of whether there was full compliance with the conditions is live.

Be that as it may, Sergon, J. ultimately heard the appeal and by a judgment dated 17th July 2015, affirmed that the respondent's defence did not raise any triable issue and accordingly dismissed the appeal. Immediately the appellant commenced execution proceedings and on 12th August 2015 the respondent filed in the High Court an application for stay of the warrants of attachment pending appeal to this Court against Sergon, J.'s judgment. The respondent contended that the warrants were fatally defective because the decree was not a money decree, the decretal amount was already secured as deposit in court, and that in any event the decree could not be executed in the manner the appellant was proceeding because it was more than one year old.

On the same day **Onyancha, J.** granted the respondent, *ex parte*, an order of stay of execution pending the hearing of the application, after noting, among other things, that the decretal amount was still deposited in court and that the decree was more than one year old. Not to be outdone, the appellant filed his own application in the High Court on 19th August 2015 seeking to set aside the order of stay of execution granted by Onyancha, J. on 12th August 2015. He contended that the court was *functus officio* and had no jurisdiction to grant the orders and that the respondent's notice of appeal to this Court was invalid, having been filed out of time, without leave.

It fell upon Sergon J. once more to hear the two applications together. By a ruling dated 6th November 2015, which is the subject of this appeal, he dismissed the appellant's application but allowed that of the respondent. He found that Onyancha, J. had jurisdiction to grant the interim orders of stay of execution and that the learned judge had granted those orders until the hearing of the application. As regards the respondent's application, he reasoned that since the respondent had already filed a notice of appeal in this Court and had applied before a single judge for extension of time, it was not within his jurisdiction to determine the validity or otherwise of the notice of appeal.

That then, is what has aggrieved the appellant and impelled him to file a memorandum of appeal containing 13 grounds of appeal. As we have already adverted, counsel for the appellant claims that what is before us is an appeal against the ruling of Sergon J. and at the same time an original petition for enforcement of constitutional rights. As far as we can understand him, the appellant's argument boils down to the submission that the ruling of Sergon, J. was a violation of **Articles 10** (national values and principles of governance); **19** (preambular provision on rights and fundamental freedoms), **20** (application of the Bill of Rights), **21** (implementation of rights and fundamental freedoms), **25** (fundamental rights and freedoms that cannot be limited), **27** (equality and freedom from discrimination), **28** (human dignity), **29** (freedom and security of the person), **40** (protection of the right to property), **43** (economic and social rights) and **48** (access to justice).

In addition to the alleged violations of constitutional rights and freedoms, the appellant's learned counsel submitted that the learned judge erred by granting an order of stay of execution whilst the respondent had not filed an appeal in this Court; by failing to order the respondent to deposit the decretal amount in an interest earning account; by failing to award him costs; by allowing the respondent to be represented by a firm of advocates whose former partner is a judge, thereby undermining the principle of independence of the bar and bench, as well as equality of arms; by failing to find that the *ex parte* stay of execution granted by Onyancha, J. had lapsed upon dismissal of the appellant's appeal; and by holding that the warrants of attachment were irregular and invalid.

Accordingly the appellant urged us to allow the appeal, set aside the order of 6th November 2016, allow him to proceed with execution of the decree, and award him **Kshs 2 million** as damages for violation of his constitutional rights.

The respondent opposed the appeal through its learned counsel, **Mr. Luseno**. Counsel explained that the intended appeal to this Court failed to materialise after a single judge declined, on 12th February 2016, to extend time for filing of the notice of appeal and that the decretal amount deposited in the High Court was immediately thereafter released to the appellant's advocate. In his view therefore this appeal is academic, an exercise in futility and misconceived because the appellant is seeking to execute the decree of the subordinate court whilst the decretal amount which was deposited in court pursuant to a court order, had already been released to him.

Learned counsel further submitted that what was before the Court was an appeal from the interlocutory ruling of Seron, J. and not a petition for enforcement of rights and fundamental freedoms, which would, in any event, have required hearing and determination in the first instance by the High Court. He urged us to find that the appeal has no merit because in granting the order of stay of execution, the learned judge had exercised discretion, which we should not interfere with because no error on the learned judge's part has been demonstrated. He added that the learned judge had properly considered that the decretal amount was already secured and that there was no justification for execution.

We have carefully considered the record of appeal, the ruling dated 6th November 2015, the memorandum of appeal, and the submissions by learned counsel. Starting with the argument that what is before us is both an appeal and at the same time an original petition for enforcement of the appellant's constitutional rights, we are not persuaded by the appellant's perception and reasoning. To begin with, the jurisdiction of this Court is purely appellate. The Court does not have original jurisdiction like the High Court. If any authority were required for that self-evident proposition, it is **Article 164(3)** of the Constitution, which provides that:

“(3) The Court of Appeal has jurisdiction to hear appeals from-

a. the High Court, and

b. any other court or tribunal as prescribed by an Act of Parliament.” (Emphasis added).

The long title to the ***Appellate Jurisdiction Act***, which regulates the procedure and practice in this Court, also leaves no doubt as to the nature of the Court of Appeal's jurisdiction. The Act describes itself as:

“An Act of Parliament to confer on the Court of Appeal jurisdiction to hear appeals from the High Court and for purposes incidental thereto.”

Then ***section 3*** of the same Act provides:

“3. (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court in cases in which an appeal lies to the Court of Appeal under any law. (Emphasis added).

2. For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court.”

In light of the above provision, this Court enforces constitutional rights and fundamental freedoms in the context of an appeal, that is to say, after the High Court has first considered the alleged violations and made a determination thereon. ***Section 3(2)*** cannot be read to give this Court original jurisdiction as the appellant claims. The powers akin to those of the High Court that are vested in this Court by that subsection are exercisable only when the Court is hearing and determining an appeal and not for purpose of enabling the Court to exercise original jurisdiction like the High Court. (See ***Rafiki Enterprises Ltd v. Kingsway Tyres Ltd, CA No. Nai 375 of 1996*** and ***Equity Bank Ltd v. Westlink MBO Ltd, CA No. Nai 78 of 2011***).

It is crystal clear to us therefore that deliberately and by design, the Constitution has unequivocally vested in the High Court the original jurisdiction to enforce constitutional rights. That is the import of ***Article 165 (3)***, which provides as follows:

“Subject to clause (5), the High Court shall have-

a. unlimited original jurisdiction in criminal and civil matters;

b. jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.”

Clause (5) has no application and cannot vest jurisdiction to enforce constitutional rights in this Court because its purpose is only to exclude the jurisdiction of the High Court in matters reserved by the Constitution for the *Supreme Court*, the *Environment and Land Court and the Employment and Labour Relations Court*.

If the appellant still has any doubt that it is to the High Court that he must turn to originate a claim founded on violation of his constitutional rights, that doubt should be put to rest by *Article 23* of the Constitution which is titled, “*Authority of courts to uphold and enforce the Bill of Rights*”. The relevant part of that Article provides:

“23 (1) *The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. (Emphasis added).*

2. *Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation, or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*”

Under that provision, just like under Art 156(3), the jurisdiction to redress violations of constitutional rights is vested in the first instance in the High Court. (See *In the Matter of the Interim Independent Electoral Commission, SC Const. App. No. 2 of 2011* and *IEBC v. Maina Kiai & 5 Others, CA No 105 of 2017*). The Environment and Land Court and the Employment and Labour Relations Court too have jurisdiction to redress violations of constitutional rights in matters falling under their jurisdiction (See *Daniel N. Mugendi v Kenyatta University & 3 Others [2013] eKLR*). The only other courts that the Constitution contemplates exercising original jurisdiction in enforcement of constitutional rights, if Parliament so provides, are the subordinate courts. Pursuant to *Article 23(2), section 8* of the *Magistrates Courts Act, 2015* vests jurisdiction in the magistrate court to hear and determine applications for enforcement of constitutional rights, but limited only to claims on freedom from torture and cruel, inhuman or degrading treatment or punishment, and freedom from slavery or servitude. If it were ever the intention of the Constitution to vest original jurisdiction in enforcement of constitutional rights in the Court of Appeal, Article 23 would have provided so.

Accordingly we are not persuaded that what is before us is an original petition for enforcement of constitutional rights. To the extent that the issues that the appellant claims to aggrieve him have not been considered by, let alone presented to the High Court, we have no basis for determining that the various rights tabulated by the appellant have been violated as he claims. We find that there is no substance in the appellant’s first argument and we accordingly reject it. It is instructive that the appellant and his advocate in this appeal, had previously raised a similar argument in another matter, but this Court promptly rejected the argument. (See *Peter Odiwour Ngoge & Another v. Jubilee Insurance Co. Ltd & Another, CA No. Nai. 298 of 2015*).

Turning to the issues that properly fall for consideration in this appeal, the appellant contends that the learned judge erred in granting an order of stay of execution while there was no valid notice of appeal to this Court on record. The learned judge found that as of the time he was hearing the application for stay of execution, the respondent had filed a notice of appeal in this Court, but the appellant insists that the notice of appeal was filed out of time and was therefore not valid.

Order 42 rule (6) (1) of the *Civil Procedure Rules*, which provides for appeals, empowers the court from which an appeal is preferred, in this case the High Court, for sufficient cause, to order stay of execution. Whether such court grants or refuses stay of execution, the court to which the appeal lies is not precluded from considering an application for stay of execution. Specifically as regards stay of execution pending appeal, *Order 42 rule 6(2)* allows the court to make an order of stay of execution only if it is satisfied that substantial loss may otherwise result; the application for stay of execution is made without undue delay;

and such security as the court may order is given. (See *Halai & Another v. Thornton & Turpin [1963] Ltd [1990] KLR 365*).

Order 42 rule (6) (4) is in these terms:

“(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

To the extent that the respondent had filed a notice of appeal in this Court at the time it was agitating its application for stay of execution before the learned judge, by dint of Order 42 rule 6(4), it was deemed to have filed an appeal. (See *Safaricom Ltd v. Ocean Beach Hotel Ltd & 2 Others, CA No. 327 of 2009*). Any question regarding the validity of the notice of appeal, as the learned judge correctly found, was for determination by this Court. **Rule 84** of the Rules of this Court allows a party who feels that a notice of appeal is invalid to apply for it to be struck out. That’s what the appellant ought to have done. In any event, under **rule 4** of our Rules, a party may apply for extension of time either before or after filing of the notice of appeal, as the respondent had done in this case. Accordingly, we also find the contention that the learned judge erred by granting an order of stay of execution without a valid notice of appeal to be devoid of substance and reject it.

As to whether the learned judge otherwise erred in granting stay of execution, we are satisfied that he did not and that he properly took into account the considerations sets out in Order 42 rule 6(2). He was satisfied that unless he gave an order of stay, the respondent would suffer substantial loss if it were subjected to execution, whilst it had already deposited the decretal amount in court. As regards security, it was a *fiat accompli* because, again, the respondent had already deposited the decretal amount in court. On delay, there was no undue delay because the judgment was delivered 17th July 2015 and the application was made on 12th August, 2015. In the event, we cannot see how the learned judge could be accused of having exercised his discretion arbitrarily or erroneously.

On award of costs, we again do not see how the learned judge can be faulted. He dismissed the appellant’s application after he found it was not merited and still did not condemn him to costs. Instead, he directed the costs to abide the outcome of the intended appeal. Even the respondent, who was the successful party, was not awarded costs of the application, the court directing that its costs to abide the outcome of the intended appeal. We do not understand how the appellant, whose application failed still expected to be awarded costs. As *Crabbe, JA* stated in *Kohli v. Popatlal [1964] EA 219*:

“...where a discretion as to costs has been exercised by a judge, his decision is unimpeachable on appeal unless he can be shown to have taken into consideration matters which are irrelevant to the issue in the case, or nonexistent.”

The appellant has not demonstrated the way in which the learned judge misdirected himself or erred in the exercise of his discretion. We are satisfied that we have no basis for interfering with the learned judge’s exercise of discretion.

We do not think that there is any basis in this appeal for us to consider whether the orders issued earlier by Onyancha, J. were valid or not. The notice of appeal before us relates to the ruling of Sergon J. dated 6th November 2016. In any event, the orders by Onyancha, J. are the subject of one of the other appeals filed by the appellant that we have adverted to earlier. As to whether Onyancha, J.’s *ex parte* orders made on 12th August 2015 had expired before Sergon J. heard the application *inter partes*, the record speaks for itself. After taking into account the fact that the decretal amount was deposited in court, that the decree was *ex facie* over one year old and that, *prima facie* there was a general rather than specific proclamation, he concluded thus:

“In the circumstances an interim stay of execution pending the hearing of this application is reasonable.”

Order 42 rule 6 (3) granted the learned judge power to make the order he did till the hearing of the

application inter partes. That provision reads:

3. Notwithstanding anything contained in sub rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application. (Emphasis added)

We shall not say more on that ground.

The last issue is the claim that the appellant was prejudiced because the law firm that represents the respondent, ***Majanja Luseno & Company Advocates***, bears the name of a serving judge. It is common ground that upon appointment to the bench, ***Majanja, J.*** resigned from the law firm. The complaint is the continued use of his name, which counsel for the appellant states he “suspects” influenced Onyancha, J. to issue orders in favour of the respondent. We asked if that was the case, why the name did not influence Serگون, J. or even ourselves, but we never really got an answer.

This ground of appeal, other than being founded on conjecture bordering on the fanciful, was never raised in the court below and therefore we are persuaded that it is just an afterthought. This Court will not suffer new issues, which were not raised before the High Court to be introduced willy-nilly. (See ***George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015***). So long as Majanja J. resigned from the firm, and he is not the one who heard this dispute, we would not find that the ruling the subject of this appeal is vitiated by the mere fact that the firm that represented the appellant bears the name of a judge who formerly practiced in it. We would require much more than mere “suspicion” to agree with the appellant’s viewpoint. In ***Peter Odiwour Ngoge & Another v. Jubilee Insurance Co. Ltd & Another (supra)***, this Court rejected the same argument that the appellant is advancing in this appeal.

We have ultimately come to the conclusion that this appeal is completely without merit and the same is hereby dismissed in its entirety, with costs to the respondent. It is so ordered.

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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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR